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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 17, 1930
CERTIORARI GRANTED MAY 26, 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

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1-2 In United States District Court, Eastern Louisiana

No. 19500

WILLIAM PFAFF, PLAINTIFF

VERSUS

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Petition

Filed Mar. 19, 1929

To the honorable the Judge of the United States District Court for the Eastern District of Louisiana.

The petition of William Pfaff, a resident of the city of New Orleans, Louisiana, respectfully represents that—

I

Plaintiff is and was during all the times herein mentioned a citizen of the United States and of the State of Louisiana, and resides in the city of New Orleans, State of Louisiana.

II

The defendant is and was during all the times herein mentioned the duly appointed, qualified, and acting collector of internal revenue for the District of Louisiana and resides in New Orleans, Louisiana.

III

3 All the acts on the part of the defendant herein complained of were done by him in his official capacity under instructions from his superior officers. There was probable cause for his said acts, and he is entitled to a certificate of probable cause in the event judgment is rendered against him herein.

IV

The plaintiff and his wife, Corinne Henrietta Sievers Pfaff, were married on the 21st day of October, 1891, and have continuously since that date maintained the marriage relation, and have continuously lived in the State of Louisiana, and have been domiciled therein and citizens thereof since prior to their marriage.

V

By their joint efforts plaintiff and his said wife accumulated after their marriage and prior to January 1, 1927, a considerable amount of property which they invested in real estate situated in the city of New Orleans, Louisiana, and stocks in various corporations and other personal property.

VI

All of the property so accumulated and acquired belongs to the community existing between the plaintiff and his wife under the laws of the State of Louisiana, and each of them is the owner of one-half (½) of said property under said laws.

VII

During the year 1927 plaintiff was an officer and employee of Searcy & Pfaff, Ltd., Union Homestead Association, American Bank & Trust Company, and International Trade Exhibition, devoting the major amount of his time to the affairs of the first two corporations, and in the year 1927 said corporations paid to plaintiff for services rendered by him in that year sums aggregating twenty-seven thousand and twenty-five ($27,025) dollars, which sums so paid accrued to the community existing between the plaintiff and his wife,
4 and became and was the property of each of them in the proportion of one-half (½) to each of them.

VIII

In addition to the salaries mentioned in the foregoing paragraph, there was received by the plaintiff and his wife during the year 1927 the following income, revenue, and profit from community property which was vested in them jointly and was the property of each of them in the proportion of one-half (½) to each, to wit:

Rent and royalties from the community real estate	$11,232.65
Dividends on community stocks	3,142.25
	$14,374.90

IX

The plaintiff's entire gross income during the year 1927 consisted of one-half (½) of the sum of the items mentioned in the preceding two paragraphs, i. e., one-half (½) of forty-one thousand three hundred and ninety-nine and 90/100 ($41,399.90) dollars, or twenty thousand six hundred and ninety-nine and 95/100 ($20,699.95) dollars.

X

The plaintiff paid during 1927 one-half (½) of the following sums, to wit:

Losses on sales of community stocks	$854.68
Interest paid	7,660.09
Taxes paid	148.37
Charitable contributions	2,210.50
Total	10,873.64

The amount so paid by plaintiff, being one-half of ten thousand eight hundred and seventy-three and 64/100 ($10,873.64) dollars, or five thousand four hundred and thirty-six and 82/100
5 ($5,436.82) dollars, was an allowable and proper deduction in the calculation of net income under the revenue act of 1926.

XI

There were filed with the defendant herein within the period required by law separate income-tax returns for the year 1927 for the plaintiff and his wife, plaintiff's income being correctly reported in his return and his wife's income being correctly reported in her return, each of them reporting one-half (½) of the entire amount of income received by the community as aforesaid, and each deducting therefrom one-half (½) of the losses, expenses, and allowances above itemized, and each reported and returned as net taxable income the remaining sum. The gross income returned and reported by petitioner was twenty thousand two hundred and seventy-two and 61/100 ($20,272.61) dollars; the total deductions and allowances returned and reported were five thousand and nine and 48/100 ($5,009.48) dollars, leaving a balance of fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars as the net income of the plaintiff. The gross and net incomes of the plaintiff's wife were, at plaintiff's instance and with his approval, reported and returned by her in corresponding figures.

XII

The returns thus made by the plaintiff and by his wife and the method adopted by each of them in calculating his and her gross and net incomes were in strict accord with the decisions of the Treasury Department of the United States then published and in force.

XIII

The tax liability of the plaintiff upon the income so reported by him at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum
6 of seventeen hundred and fifty ($1,750) dollars, and plaintiff's claim to earned income in the sum of thirteen thousand five

hundred and twelve and 50/100 ($13,512.50) dollars was the sum of three hundred and forty-one and 55/100 ($341.55) dollars, which was paid in full at the time required by law. The tax liability of plaintiff's said wife upon the income so reported by her at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of seventeen hundred and fifty ($1,750) dollars and her claim to earned income in the sum of five thousand ($5,000) dollars was the sum of four hundred and thirty and 17/100 ($430.17) dollars, which was likewise paid in full at the time required by law.

XIV

After the plaintiff had filed his income-tax return for the year 1927 as above set forth, said return was audited and examined by the Commissioner of Internal Revenue, who determined that the return made by plaintiff was incorrect and that the amount of taxes paid by him was insufficient in that, according to the contention of said Commissioner of Internal Revenue, all of the income of the community, both that reported by the plaintiff and that reported by his wife, should have been reported and returned by the plaintiff and the tax calculated at the rates provided for by the revenue act of 1926 upon a net income of thirty thousand five hundred and twenty-six and 26/100 ($30,526.26) dollars instead of two net incomes of fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars each. The commissioner notified under date of August 1st, 1928, the plaintiff by registered mail, in accordance with section 274 of the revenue act of 1926, that he had made this determination and that he proposed to assess against the plaintiff a deficiency in income tax for the year 1927 for account thereof amounting to thirteen hundred and forty-eight and 50/100 ($1,348.50) dollars.

7

XV

In order to expedite a judicial decision of the controversy, plaintiff waived an appeal the United States Board of Tax Appeals, and on August 20, 1928, paid under protest to the defendant at New Orleans, Louisiana, the additional taxes claimed in the sum of thirteen hundred and forty-eight and 50/100 ($1,348.50) dollars, with interest in the sum of thirty-two and 51/100 ($32.51) dollars, making a total of thirteen hundred and eighty-one and 01/100 ($1,381.01) dollars, which had been assessed against the plaintiff by the Commissioner of Internal Revenue and certified to the defendant for collection.

XVI

Thereafter plaintiff filed with the defendant in the manner provided by law a claim for the refund of said sum so paid, which claim was based upon the facts herein set forth, which claim was rejected by the Commissioner of Internal Revenue on August 21, 1928.

XVII

The income reported by plaintiff for the year 1927 comprised his entire share in the community income under the laws of the State of Louisiana and all the income accruing or belonging to him for that year.

XVIII

Plaintiff is not subject to taxation under the revenue act of 1926 upon his wife's one-half (½) of the community income, and the action of the Commissioner of Internal Revenue in adding to the plaintiff's income as reported by him his wife's share in community income is improper, erroneous, and illegal, as was and is the assessment and collection of the additional sum of thirteen hundred and eighty-one and 01/100 ($1,381.01) dollars exacted by the defendant of the plaintiff.

8

XIX

The effect and result of the acts of the defendant in demanding and collecting from him a tax upon his income plus the income of his wife is to levy and collect a tax upon something not within the meaning of the term "income" as it is used in the sixteenth amendment to the Constitution of the United States.

XX

The exaction and collection of said tax is in violation of the third clause of section 2 and the fourth clause of section 9, of Article I, of the Constitution of the United States.

XXI

The exaction and collection of said additional tax is in violation of section 8 of Article I and in violation of the fifth amendment to the Constitution of the United States.

XXII

The revenue act of 1926 does not authorize or require the taxing of plaintiff upon the income of his wife as the Commissioner of Internal Revenue has undertaken to do, but if said revenue act could be construed as providing or requiring such taxation, then said act would be and is as to this plaintiff unconstitutional and void in that—

(a) It requires the collection from plaintiff of a tax based in whole or in part upon the income of Mrs. Pfaff;

(b) It requires the collection from plaintiff at progressive rates of a tax based not upon his income alone but upon the combined income of plaintiff and Mrs. Pfaff, thereby not only obliging plaintiff to pay

upon an income not his own but obliging him to pay at a higher rate upon his own income;

(c) It forbids and prohibits plaintiff and Mrs. Pfaff from filing separate income tax returns including therein the income only belonging to and received by them, respectively, which right is allowed under the revenue act to citizens of other States;

(d) It levies a direct tax upon the real estate and invested personal property owned by plaintiff and Mrs. Pfaff and the fruits and revenues therefrom, which direct tax is not upon income as the term is used in the sixteenth amendment to the Constitution, and which is not apportioned among the several States upon the basis of any census or enumeration, and it is also arbitrary and capricious in that it uses as a basis and as the subject of a tax assessed against and collected from plaintiff at progressive rates the combined incomes of himself and Mrs. Pfaff instead of the income only of plaintiff;

(e) It provides for the taking of the property of the plaintiff without due process of law and denies to him the equal protection of the law, and in all of which respects and particulars, as well as in other respects and particulars, it violates the third clause of section 2, the first clause of section 8, the fourth clause of section 9, all of Article I of the Constitution of the United States, as well as the fifth and sixteenth amendments to the Constitution of the United States.

XXIII

By reason of the premises plaintiff is entitled to have and recover from the defendant the taxes and interest wrongfully exacted of him in the sum of thirteen hundred and eighty-one and 01/100 ($1381.01) dollars, as hereinabove set out, with interest thereon as required by law.

Wherefore plaintiff prays that the defendant, Jacob O. Bender, be served with a copy of this petition and be duly cited to appear and answer hereto, and after due proceedings there be judgment in favor of plaintiff and against defendant in the full sum of thirteen hundred and eighty-one and 01/100 ($1381.01) dollars, together with interest thereon from the date of payment at the rate of six per cent (6%) per annum, and all costs of suit; and there be issued by the court a certificate of probable cause for the conduct of the defendant in his official capacity as aforesaid. Plaintiff further prays for general and equitable relief.

(Sig.) SPENCER, GIDIERE, PHELPS & DUNBAR.
(Sig.) MONROE & LEMANN.
(Sig.) WM. PFAFF.

[*Duly sworn to by William Pfaff; jurat omitted in printing.*]

[Citation in usual form showing service on Jacob O. Bender, collector, filed Mar. 25, 1929, omitted in printing.]

12–13 In United States District Court

[Title omitted.]

Answer

Filed Mar. 22, 1929

To the honorable the Judge of the United States District Court for the Eastern District of Louisiana:

Now into court comes Jacob O. Bender,. collector of internal revenue for the district of Louisiana, and for answer to plaintiff's petition with respect says:

I

Defendant admits article one of plaintiff's petition.

II

Defendant admits article two of plaintiff's petition.

III

Defendant admits article three of plaintiff's petition.

IV

Defendant admits article four of plaintiff's petition.

V

Defendant admits article five of plaintiff's petition.

14 VI

Defendant denies that each, the plaintiff and his wife, is the owner of one-half (½) of the community property or the income therefrom and otherwise admits article six.

VII

Defendant denies that each, the plaintiff and his wife, is the owner of one-half (½) of said community property or the income therefrom and otherwise admits article seven.

VIII

Defendant denies that each, the plaintiff and his wife, was the owner of one-half (½) of said community property or the income therefrom and otherwise admits article eight.

IX

Defendant denies article nine of plaintiff's petition.

X

Defendant denies article ten of plaintiff's petition and states that plaintiff paid out of community funds the entire amount mentioned in said article, and not one-half thereof as alleged.

XI

Defendant denies that plaintiff's income was correctly reported in his return and denies that his wife's income was correctly reported in her return, and otherwise admits article eleven.

XII

Defendant denies article twelve of plaintiff's petition.

XIII

Defendant admits article thirteen of plaintiff's petition.

XIV

Defendant admits article fourteen of plaintiff's petition.

XV

Defendant admits article fifteen of plaintiff's petition.

15 XVI

Defendant admits article sixteen of plaintiff's petition.

XVII

Defendant denies article seventeen of plaintiff's petition.

XVIII

Defendant denies article eighteen of plaintiff's petition.

XIX

Defendant denies article nineteen of plaintiff's petition.

XX

Defendant denies article twenty of plaintiff's petition.

XXI

Defendant denies article twenty-one of plaintiff's petition.

XXII

Defendant denies article twenty-two of plaintiff's petition.

XXIII

Defendant denies article twenty-three of plaintiff's petition.

XXIV

And in further answer to plaintiff's petition defendant alleges:

(a) That the title to the real estate and to the stock and other personal property mentioned in article five (5) of plaintiff's petition at all times stood in the name of the plaintiff, the husband.

(b) That at all times the plaintiff husband had control over and disposition of the earnings, income and revenue referred to in articles seven (7) and eight (8) of plaintiff's petition.

16 (c) That the tax paid by his wife as alleged in plaintiff's petition has been treated by the Commissioner of Internal Revenue as an overpayment and has been or will be in due course refunded to her.

Whereupon defendant prays that there be judgment in his favor and against plaintiff and that there be further judgment in his favor for all costs in his behalf incurred. And the defendant further prays that in the event this honorable court should render judgment in favor of the plaintiff then in that event this court do release this defendant from any personal liability in accordance with R. S., sec. 989, and defendant prays for all further general and equitable relief.

(Signed) JACOB O. BENDER.

(Signed T. M. LOGAN BRUNS
Assistant United States Attorney,
Of Counsel for Defendant.

[*Duly sworn to by Jacob O. Bender; jurat omitted in printing.*]

17 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Stipulation and agreed statement of facts

Filed Oct. 25, 1929

The parties to this proceeding, each acting by and through their attorneys of record duly authorized, hereby stipulate and agree as follows:

I

That a jury trial is waived, and the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes. (Secs. 773 and 875, U. S. C.)

II

Both parties admit and agree that the following is a true statement of the facts in this case, and this case shall be submitted upon the same as an agreed and admitted statement of facts.

III

(a) William Pfaff, the plaintiff, since his birth has been and now is a citizen of the United States and of the State of Louisiana,
18 and has resided and now resides in the parish of Orleans, city of New Orleans, State of Louisiana, in the collection district for the collection of internal revenue of the United States known as the District of Louisiana.

(b) Jacob O. Bender, the defendant, is the duly appointed and qualified collector of internal revenue of the United States for the District of Louisiana, and resides in the parish of Orleans, city of New Orleans, State of Louisiana, which is in the said district of the United States known as the District of Louisiana.

(c) The parish of Orleans, State of Louisiana, is in the district for the collection of internal revenue of the United States known as the Louisiana District, and also is in the judicial district of the United States known as the Eastern District of Louisiana, New Orleans division.

(d) The taxes and interest sued for in this proceeding were paid by the plaintiff to the defendant in his official capacity, and defendant's action in demanding and collecting such taxes and interest was in accordance with the instructions of his superior officers duly appointed qualified, and acting. The defendant in so demanding such taxes and interest had probable cause therefor, and in the event of a decision in this case adverse to him he is entitled to a certificate of probable cause.

(e) The plaintiff and his wife, Corinne Henrietta Sievers Pfaff, were married on the 21st day of October, 1891, and have continuously since that date maintained the marriage relation, and have continuously lived and resided in the State of Louisiana, and have been domiciled therein since prior to their marriage, and the said Corinne Henrietta Sievers Pfaff has been throughout such period and is now a citizen of the United States and of the State of Louisiana.

(f) Neither the plaintiff nor his said wife at the time of
19 their marriage had any property or pecuniary rights, and neither of them has since acquired any paraphernal or separate property.

(g) Plaintiff and his said wife accumulated after their marriage, and prior to January 1st, 1927, a considerable amount of property, which was invested in real estate situated in the city of New Orleans, Louisiana, and stocks in various corporations and other personal property. All of the property so accumulated and acquired, as well as the increase and income derived therefrom, belongs to the community partnership existing between the plaintiff and his wife under the laws of the State of Louisiana. The title to all of the property so accumulated and acquired stood during the period of ownership in the name of the plaintiff.

(h) There was received by the community partnership during the year 1927 the following income, revenue, and profit from the property mentioned in subdivision (g) of this stipulation to wit:

Rent and royalties from the community real estate	$11,232.65
Dividends on community stocks	3,142.25
	$14,374.90

(i) During the year 1927 plaintiff was an officer and employee of Searcy & Pfaff, Ltd., Union Homestead Association, American Bank & Trust Company, and International Trade Exhibition, devoting the major amount of his time to the affairs of the first two corporations, and in the year 1927 said corporations paid to plaintiff for services rendered by him in that year sums aggregating twenty-seven thousand and twenty-five ($27,025.00) dollars.

(j) Plaintiff and his wife had no income for the year 1927 taxable under the revenue laws of the United States other than the income above described, consisting of the sum of the items mentioned in the two preceding paragraphs, *i. e.*, forty-one thousand and three hundred ninety-nine & 90/100 ($41,399.90) dollars.

(k) The plaintiff paid from the community partnership funds for the year 1927 the following sums, which constitute allowable and proper deductions from gross income in the calculation of net income under the revenue act of 1926, to wit:

Losses on sales of community stocks	$854.68
Interest paid	7,660.09
Taxes paid	148.37
Charitable contributions	2,210.50
	$10,873.64

(l) There were filed with the defendant herein within the period required by law, at plaintiff's instance and with his approval, separate income-tax returns for the year 1927 for the plaintiff and his wife, in accordance with the rulings made by the Bureau of Internal Revenue then on file and in effect. The returns were on Form 1040, furnished to taxpayers by the Bureau of Internal Revenue, and the defendant was the proper collector with whom the same should be filed. Copies of the returns filed by the plaintiff and his wife are hereto attached and made a part hereof, and marked, respectively, Exhibits "A" and "B" for identification herewith.

In each return there was included, under proper headings, one-half of the income received by the community partnership hereinabove described, from which there was subtracted one-half of the losses, expenses, and allowances as deductions, as hereinabove itemized, and each reported and returned as net taxable income the remaining sum. The gross income returned and reported by petitioner was twenty thousand, two hundred and seventy-two and 61/100 ($20,272.61) dollars; the total deductions and allowances re-
21 turned and reported were five thousand and nine and 48/100 ($5,009.48) dollars, leaving a balance of fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars as the net income of the plaintiff. The gross and net incomes of the plaintiff's wife were, at plaintiff's instance and with his approval, reported and returned by her in corresponding figures.

(m) The tax liability of the plaintiff upon the income so reported by him at the rates provided by the revenue act of 1926, after giving effect to plaintiff's claim of personal exemption in the sum of seventeen hundred and fifty ($1750.00) dollars and plaintiff's claim to earned income in the sum of thirteen thousand five hundred and twelve and 50/100 ($13,512.50) dollars, was the sum of three hundred forty-one and 55/100 ($341.55) dollars, which plaintiff paid out of community funds at the time required by law. The tax upon the income so reported on the separate return filed by the plaintiff's said wife at the rates provided by the revenue act of 1926, after giving effect to said wife's claim of personal exemption in the sum of seventeen hundred and fifty ($1750.00) dollars and her claim to earned income in the sum of five thousand ($5,000.00) dollars, was the sum of four hundred thirty and 17/100 ($430.17) dollars, which was similarly paid in full at the time required by law.

The income so reported by the plaintiff in his return and the income reported in the separate return of his said wife in the year 1927 covered their interest in community property income under the laws of the State of Louisiana. If plaintiff and his wife were entitled to divided community income less deductions, exemptions, and credits, as above described, the plaintiff's return was correct and the tax liability of the plaintiff thereon was as stated on his return.

If plaintiff and his wife are not entitled to divide commu-
22 nity income less the deductions, exemptions, and credits above described, it is expressly stipulated and agreed that the plaintiff is not entitled to a refund in this proceeding for any portion of the amount paid by him for which this suit is brought.

(n) Upon auditing the aforesaid tax return of the plaintiff for the year 1927 the Commissioner of Internal Revenue determined that said return of the plaintiff was incorrect and that the amount of taxes paid by him was insufficient in that, according to the determination of the commissioner, the plaintiff should have reported all of said income and claimed all of said deductions in plaintiff's return, and the tax should have been calculated and paid at the rates provided in the revenue act of 1926 upon a net income of thirty thousand five

hundred and twenty-six and 26/100 ($30,526.26) dollars, less the personal exemption and income credit provided by law, instead of upon two net incomes each comprising one-half of said amount, or fifteen thousand two hundred and sixty-three and 13/100 ($15,263.13) dollars each.

And upon auditing the aforesaid tax returns of the plaintiff's wife for the year 1927 the Commissioner of Internal Revenue determined that said returns of said wife were incorrect in that, according to the determination of the commissioner, the plaintiff's wife should have reported none of the community income and no tax should have been paid by her thereon, and the entire amount so paid by plaintiff's wife should be refunded to her.

(o) The commissioner notified plaintiff by registered mail, under date of August 1st, 1928, in accordance with section 274 of the revenue act of 1926, that he had made this determination, and that he proposed to assess against the plaintiff a deficiency in income tax for the year 1927 for account thereof amounting to thirteen hundred and forty-eight and 50/100 ($1348.50) dollars.

(p) Plaintiff, without prejudice to his rights, waived an ap-
23 peal to the United States Board of Tax Appeals, and on August 20th, 1928, paid under protest to the defendant at New Orleans, Louisiana, the additional taxes claimed in the sum of thirteen hundred and forty-eight and 50/100 ($1348.50) dollars, with interest in the sum of thirty-two and 51/100 ($32.51) dollars, making a total of thirteen hundred and eighty-one ($1381.00) dollars, which sum had been assessed against the plaintiff by the Commissioner of Internal Revenue and certified to the defendant for collection.

(q) Thereafter, plaintiff filed with the defendant, in the manner provided by law, a claim for the refund of said sum so paid, which claim was based upon the facts herein set forth, which claim was rejected by the Commissioner of Internal Revenue on August 23, 1928, whereupon this suit was instituted.

IV

The plaintiff has complied with all of the conditions precedent and other formal requirements of the statutes and rules relating to his right to institute and prosecute this suit in the manner and upon the grounds alleged in his pleadings, and all informalities, if any, are hereby waived. The defendant and other officers of the United States have complied with all formal requirements of the statutes and regulations in making the deficiency assessments, in collecting the same, and in rejecting plaintiff's claim for the refund.

V

Subject to the right of either party to object to the consideration of the same as irrelevant or immaterial and without limitation upon the power of the court to take judicial notice, it is further agreed

that the records of the Congress of the United States disclose the following proceedings:

A–1. The revenue act of 1921 as introduced into the House
24 of Representatives, as reported by the Ways and Means Committee of the House and as passed by the House, contained the following clause:

"Income received by any community shall be included in the gross income of the spouse having management and control of the community property."

A–2. The revenue act of 1921, as reported by the Finance Committee of the Senate, substituted for the above quoted clause the following:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

A–3. The Finance Committee, in making its report to the Senate, discussed the foregoing provisions as follows at page 14 of the report:

"Under an opinion of the Attorney General residents of States having a community property law enjoy marked advantage over residents of other States. Income, which in other States is taxed as a unit to the husband, is divided between husband and wife in States having community property laws, and surtaxes are correspondingly reduced. An amendment is added to this section designed to restore uniformity of treatment by providing that income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

A–4. The bill as passed by the Senate eliminated the clause above quoted and as finally enacted contained no specific reference to community income.

25 B–1. Committee Print No. 1 of the revenue act of 1924, as introduced into the Sixty-eighth Congress and filed on December 17, 1923, was entitled as follows:

"The Revenue act of 1924, Containing Proposed Amendments to the Existing Law Suggested by the Secretary of the Treasury."

and at page 58 of the bill there was included, described as new matter, the following provision:

"Income received by any marital community shall be included in the gross income of the spouse having the management and control of the community property, and shall be taxed as the income of such spouse."

B–2. The bill as reported by the Ways and Means Committee of the House of Representatives eliminated the foregoing clause and contained no reference to community income.

C–1. While the Senate was considering the revenue act of 1926 the following amendment to page 12 of the bill was offered by Senator Wesley M. Jones, of the State of Washington:

"The liability of any taxpayer under any internal revenue law shall be determined, unless such taxpayer otherwise consents or requests, in accordance with the Treasury Decisions, Opinions of the Attorney General, and regulations made by the commissioner or the secretary or by the commissioner with the approval of the secretary in force at the time his return was made, whether such return was made before or after the enactment of this act. As used in this subdivision, the term 'return' means, in the case of a return which has been amended, the return as finally amended."

26 C–2. On February 12, 1926, the Senate, without a record vote, adopted the foregoing amendment, the same appearing in the bill as adopted by the Senate as section 1213. In conference there was substituted for this provision a clause in the language of and which became section 1212 of the revenue act of 1926.

VI

Nothing in this stipulation shall be construed as a limitation upon the right of the court to take judicial notice of any other matters that under the law may properly be made the subject of such judicial notice.

VII

This agreement and stipulation shall, upon its execution, be filed in this cause and become a part of the record therein.

In witness whereof the attorneys of record of the respective parties have executed this agreement the 12th day of October, 1929.

(Sgd.) T. M. LOGAN BRUNS,
Asst. U. S. Atty.
" CHAS. E. DUNBAR, JR.,
" MONTE M. LEMANN,
Attys. for Plaintiff.

27 In United States District Court

[Title omitted.]

Motion for judgment

Filed Oct. 12, 1929

Now comes Jacob O. Bender, made defendant herein through T. M. Logan Bruns, assistant United States attorney for the Eastern District of Louisiana, and W. H. Trigg, special attorney, Bureau of Internal Revenue, of counsel for defendant, and after conclusion of all the evidence, a stipulation of facts having been previously filed herein and now being made a part of this motion, respectfully moves the court for judgment in favor of the defendant for the reason that there is no substantial evidence to support a judgment in favor of

the plaintiff and against the defendant and that the defendant is entitled to judgment against the plaintiff dismissing the said plaintiff's petition and for the recovery from said plaintiff of the costs herein expended.

(Signed) T. M. LOGAN BRUNS,
Assistant United States Attorney,
Of Counsel for Defendant.

(Signed) W. H. TRIGG,
Of Counsel for Defendant.

28 In United States District Court

No. 19,500. At law

WILLIAM PFAFF, PLAINTIFF
VERSUS
JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Charles E. Dunbar, Monte M. Lemann, New Orleans, Louisiana, for the plaintiff; T. M. Logan Bruns, assistant U. S. attorney, for the defendant; W. H. Trigg, special attorney, Bureau of Internal Revenue, New Orleans, La.

Opinion

Filed Dec. 6, 1929

DAWKINS, J.: This suit is for the recovery of $1,348.50 paid under protest as the result of a deficiency assessment on plaintiff's income return for 1927. Plaintiff and his wife lived under the regime of the matrimonial community established by the Louisiana law, and accordingly made separate returns, each for one-half of the total income of the year in question. They were married in this State and have continued to reside here at all times. All of their revenues were from community sources. The Government refused to
29 accept payment upon the basis claimed, but required the plaintiff to pay the taxes upon the whole as his individual income, with the result that the amount was increased by the sum which he now seeks to recover.

The jury has been waived and the matter submitted upon an agreed statement of facts, which now presents for decision only a question of law; that is, as to whether under the law of Louisiana the plaintiff and his wife were joint owners of the income and entitled to make returns as such for the taxes levied by the revenue act of 1926. It, therefore, becomes necessary to review the statutory provisions of the State as well as the interpretation placed thereon by its court of last resort to determine the extent of the interest of the wife in the community property and income. These are to be found in the Louisiana Civil Code, arts. 2399 to 2437, inclusive, which primarily

have their origin in the Spanish law. I quote some of the most pertinent provisions as follows:

"ART. 2399. Every marriage contracted in this State superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

"ART. 2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attend to, and not the person who made the purchase. But damages resulting from personal injuries to
30 the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; 'provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws.' (As amended and reenacted by act 68 of 1902.)

"ART. 2404. The husband is the head and master of the partnership of community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without the consent and permission of his wife.

"He can make no conveyances inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the childen of the marriage.

"Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

"ART. 2403. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

31 "ART. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has

been thus brought in marriage by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

"ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil or the results of labor, belongs to the conjugal partnership, if there exists a community of gains."

It is thus seen that in the absence of a prenuptial agreement that there shall be no community, the law conclusively presumes its existence and not only does the property acquired through the joint and individual efforts of the spouses, regardless of the name in which it is taken, thereafter fall into the partnership, but also all profits and revenues arising from whatever may be brought into the marriage or may be received by either during its existence, except such as comes to the wife from her paraphernal property separately administered by her. While the relation is referred to as a partnership, it does not possess all of the characteristics of a commercial firm, but has some features resembling that status. So long as there exists no occasion for invoking by the wife of certain remedial provisions for her protection, the husband manages and disposes of the community property and income without
32 having to obtain the consent of his wife, subject to the limitations hereinafter discussed. However, he can "make no conveyance inter vivos by a gratuitous title of the immovables, nor of a whole or a quota of the movables, unless it be for the establishment of the children of the marriage. Nevertheless, he may dispose of the movables by a gratuitous and particular title to the benefit of all persons." However, if he does so in fraud of the wife, she may at his death "have her action" against his heirs for reimbursement of her half thereof.

When the marriage is dissolved, either by death or divorce, the property, consisting both of what has been earned and acquired during its existence and of the profits from their separate estates, save those which arise from the paraphernal property of the wife separately administered by her, is divided into two equal parts, which vests, either in the heirs of the deceased and the survivor, respectively, or the spouses, as the case may be, in absolute ownership. It is an interest of which the wife and her heirs can not be deprived by the husband. But they are protected from his mismanagement in that if the community is involved, they may accept the same under the law with what is called "benefit of inventory." This means that there must be an administration of the estate under the probate powers of the court, resulting in a marshaling of the property or assets and payment of the community debts, and a distribution of the residue, if any, one-half to each of the beneficial interests. In this way the wife or her heirs escape personal liability for the debts of the community, in event it proves involvent. The Supreme Court of Louisiana has construed these provisions of the code as vesting in the wife during marriage the title to one-half of

the community property and not as constituting a mere expectancy. See Philipps vs. Philipps, 160 La. 813, and authorities therein reviewed and analyzed. It is there pointed out that the interest does not come to the wife solely as a result of the dissolution of the marriage, but exists at all times, subject only to the administration of the husband; that it is not in the nature of an inheritance, and neither she nor her heirs can be deprived thereof by any act of the husband. In Cole vs. Cole's Executors, 7 Martin (N. S.) 71, the supreme court of the State, through Justice Porter, pointed out the difference between the views expressed by the French commentators as to the nature of the wife's interest in community property, and the law of Louisiana, and in doing so said:

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"But it is not for us to deny, or even doubt the correctness of their conclusions in relation to the law of France. It is sufficient that it is not the same as ours, and that the difference is marked on this very point. The Napoleon Code does not contain the provision found in the code of Louisiana, that if the husband alienates, during coverture, the acquets and gains, with the intention of injuring the wife, she may, at his decease bring an action to set aside the alienation. The laws of Spain seem to have furnished that doctrine to the jurisconsults who prepared our code. And the exercise of such a right, does appear to us utterly opposed to the principle, that the wife has no interest in the property, until the community is dissolved; for if she has not, how can she maintain an action to set aside the alienation? Who ever heard of a suit, the sole basis of which was, that the hopes and expectations of the plaintiff had been disappointed and defeated by the acts of the defendant?"

See also Theall vs. Theall, 7 La. 226, wherein it was held that the will of the husband conveying "one-half of all (his property) to my wife" transmitted only one-half of his half of the community, and not the other half, for the reason that the wife took the latter in her own right and hence could not be conveyed by the husband, who did not own it. To the same effect see Ramsey vs. Beck, 151 La. 190.

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The State Supreme Court has also consistently held that the surviving spouse does not have to pay the State inheritance tax upon the half of the community property falling to her at its dissolution. Succession of Marsal, 118 La. 212. On the other hand, where the husband or wife wills his or her half of the community to the survivor, the inheritance tax is due as in case of any other legacy. Succession of May, 120 La. 692; Succession of Popp, 146 La. 464. The debts incurred during marriage must be paid out of community assets, but those of either spouse contracted before marriage have to be borne by their separate interests. If the latter be discharged with community funds, then on the dissolution of the community the one for whose benefit the payment was made must account therefor or be charged with the same in the settlement of the partnership. Childers vs. Johnson, 6 La. Ann. 634.

The Supreme Court of the United States in cases arising from some of the other States having laws establishing matrimonial communities similar to those of Louisiana has had occasion to consider the nature of the interest of the wife therein, and while the question here raised was not involved, i. e., the ownership of one-half of the community income, nevertheless it has uniformly held (except as to the State of California where the statutory provisions are materially different) that the interest of the wife is a vested one and not a mere expectancy. See Warburton vs. White, 176 U. S. 484; Arnett vs. Reade, 220 U. S. 311. Similar holdings are to be found in the decisions of the Federal district and appellate courts. Beck vs. Miller, 8 Fed. (2) 797; Bacon vs. Hopkins (D. C., Texas), 27 Fed. (2) 140; Rucker vs. Blair (C. C. A., Wash.), 32 Fed. (2) 916. The interest is of such a nature that if it were sought to be divested by a
35 statute seeking to abolish the community, the same would probably be unconstitutional as destroying a vested right. Dixon vs. Dixon's Executors, 4 La. 188; Arnett vs. Reade, supra.

I am of the opinion, therefore, that the contention that the wife has a vested interest in community property and not a mere expectancy is sustained both by the statutory provisions of the State as construed by its supreme court, as well as the decisions of the Supreme and other Federal courts.

The remaining issue is as to whether or not the character of control exercised by the husband over community income in this State is such as to constitute him the owner thereof for the purposes of Federal income taxation while the community remains undissolved. The extent of the husband's control is found in art. 2404 of the code, which declares that he is the "head and master of the partnership of community gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without the consent or permission of his wife." Standing alone this expression would indicate that he could dispose of community property, including revenues, which is the same thing as income, only for value, which value, whether in property or otherwise so acquired, would in turn vest in the community. However, the succeeding paragraphs of this article modify the preceding ones to some extent by declaring specifically that he "can make no conveyance inter vivos by a gratuitous title of the immovables of the community, nor of the whole, or a quota of the movables unless it be for the establishment of the children of the marriage." Of course a "conveyance inter vivos by gratuitous title" means a donation to take effect while he is yet alive and the community, therefore, still extant, and the article by this language clearly deprives him of the power to the extent indicated of giving away the community real estate except for the estab-
36 lishment of the children of the marriage. It also prevents him from giving in a similar manner "the whole or a quota of the movables" except for the same purpose. The third paragraph then goes a step further and declares that he "may dispose of the movable effects by a gratuitous and particular title to the benefit of

all persons." Movables mentioned in this article mean the same thing as personal property under the common law or all kinds of property other than real estate. While no case has been cited interpreting these apparently conflicting provisions, it would seem that a reasonable construction would be that while he can neither dispose of the whole of the movables nor a considerable portion thereof by donation to take effect during his lifetime and the existence of the community, he may nevertheless so dispose of particular objects or things of that class by particular title to whomsoever he may choose. At the same time, all of the powers thus given, regardless of extent, are further circumscribed and limited by the last paragraph which gives the wife a right of action against his heirs at his death for the recovery of the value of such property when the same has been conveyed to defraud or injure her by fraudulently depriving her of her interest in the community. The last provision, that is prohibiting the fraudulent disposal by the husband of the immovables, was not found in the French or Napoleonic Code but was derived from the Spanish law. Dixon vs. Dixon's Heirs, 4 La. 188 (1924). But the Louisiana law goes still further and it is not necessary that the community should be dissolved before she can protect herself against such fraud of the husband, but she may do so in an action for separation from bed and board or for a separation of property. Smallwood vs. Pratt, 3rd Rob. 132; Gastauer vs. Gastauer, 131 La. 1.

The jurisprudence of Louisiana is uniformly to the effect that not only may the wife sue for dissolution of the community and
37 separation of property where her paraphernal or dotal interests are in jeopardy, but she may do so also for the purpose of safeguarding her future earnings arising from her own industry whenever the husband is guilty of mismanagement or other faults which render the same necessary. Such a right of action is available to her without the necessity of coupling therewith a suit for separation from bed and board or divorce. When such a judgment of separation of property and dissolution of the community is rendered, the court will also decree a division of the community property then owned by them jointly. The case of Gastauer vs. Gastauer, 131 La., p. 1, is directly in point. There the wife sued her husband for a separation of property and dissolution of the community and sought to have herself declared the owner of certain real property which had been acquired in her name during the community but which was later conveyed to a homestead association to secure a loan and subscription to certain shares of stock in the company. She also sought to enjoin the homestead company from reconveying it to her husband on the claim that it was her separate property. The lower court gave judgment for the defendant, but on appeal this was reversed and the property was held to belong to the community, which the court dissolved and decreed the property to belong in equal portions to the spouses. I quote a part of the opinion and decree expressing the views of that court and showing the disposition which it made of the matter, including a division of the costs equally between the litigants:

"(3) The right of a wife to demand a separation of property is not dependent upon the actual possession by her of separate property, or upon the existence of any claim against her husband for the reimbursement of paraphernal funds. It is enough that she show that the habits and circumstances of her husband render such separation necessary in order to enable her to preserve for her
38 family the earning that she may derive from her separate industry and talent; and that proof plaintiff has made. Davock vs. Darcy, 6 Rob. 342; Penn vs. Crockett, 7 La. Ann. 343; Wolf & Clark vs. Lowry, 10 La. Ann. 272; Webb vs. Bell, 24 La. Ann. 75; Chaffe & Sons vs. Watts, 37 La. Ann. 324; Brown & Learned vs. Smythe, 40 La. Ann. 325, 40 South. 869; Jones vs. Jones, 119 La. 687, 44 South. 429.

"It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment in favor of plaintiff and against George Gastauer, her husband, decreeing a separation of property between them. It is further decreed that, as between said litigants and the Union Homestead Association and as between said litigants inter sese, all the rights apparently accruing to the plaintiff, Sophie Gastauer, otherwise Mrs. George Gastauer, under the resolution of said association of February 3, 1902, and by reason of her holdings of the stock of said association, be decreed to have been vested in the community lately existing between plaintiff and her said husband, and to be now vested in the members of said late community, share and share alike. It is further decreed that the costs of this litigation be paid in equal proportions by the plaintiff and her said husband."

Not only has she such a right, but the State code of procedure supplements this with an express provision for a writ of injunction to prevent his disposing of the community property pending such an action. Art. 298 directs, among other grounds, that the writ "must be granted and directed against the defendant * * *."

"6. When a woman has sued her husband for a separation of property or for a separation from bed and board and fears
39 that he will during the pendency of the suit dispose to her prejudice of the property either held in the community or on which she has a privilege for her dotal rights."

The judgment of separation of property is effective from the date of filing of the petition. R. C. C. 2432. The wife may require an inventory of all the property in possession of the husband, and from the date on which the action is brought "it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time shall be null if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife." R. C. C. 149, 150. During the pendency of such action he is not entitled to the revenues of common property, but must account therefor. Dillon vs. Dillon, 35 Ann. 92; McClelland

vs. Gasquet, 122 La. 241; Hill vs. Hill, 115 La. 490; Crochet vs. Dugas, 126 La. 285; Williams vs. Goss, 43 Ann. 868. Irrespective of the grounds of separation or by which of the spouses the community property was produced, on its dissolution he or she is entitled to receive one-half thereof. Brooks vs. House, 168 La. 542. Any sums spent out of community funds upon the separate property or in payment of debts anterior to the marriage must be accounted for at dissolution and charged to the separate estates of the spouses (R. C. C. 2403), and even if the same were paid out of revenues of the separate property of the husband which falls into the community, he must likewise account therefor. Glenn vs. Elam, 3 Ann. 611. See also Dillon vs. Freville, 129 La. 1005; Succession of Casey, 130 La. 743. Until the amendment of the code some fifteen years ago the community interest of a deceased husband or wife descended to their heirs, including collaterals, but since that time, in the absence of descendants or ascendants, the interest is now inherited by the survivor. R. C. C. 915; Bossier vs. Herwig, 112 La. 539.

40 The relation of the husband to the community and its income is more in the nature of a statutory agency, giving him considerable latitude in its management and the application of its funds, hedged about with legal safeguards permitting the wife to protect her interest and to put an end to the agency upon the happening of the circumstances mentioned in the code, and compelling him to account therefor to such extent and in such manner as excludes the idea of that ownership which is necessary to support his liability for taxes in the case of the ordinary taxpayer. Warburton vs. White, supra. The husband may manage the community as a prudent administrator and is not responsible for mistakes of judgment, but he can not dispose of its effects fraudulently without being accountable therefor. And the wife may put an end to this management whenever her interest is in jeopardy, request a division, and compel him or his heirs to account for his fraud.

The revenue act of 1926 (sec. 210–a) under which the taxes herein involved were collected provides for the levy at certain rates "upon the net income of every individual * * *"; and section 223–b declares that the incomes of husband and wife may be made by returns separately or jointly. It would seem, therefore, if the income arising from the community belongs in the proportion of one-half to each, then they are entitled to report the same as individuals. The relation as established by the Louisiana law appears more analogous to that of a partnership for taxing purposes. It is referred to as such in many articles of the code. R. C. C. 2399, 2402, 2406, 2430. With respect to the return and taxation of an interest in a partnership, sec. 218–a provides:

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his dis-

41 tributive share, whether distributed or not, of the net income of the partnership for the taxable year, etc."

If the income (one-half of the whole) in this case was the property of the wife, I think it should have been assessed and the tax paid by her, for it will not be assumed that Congress intended to tax one individual for the income of another. I find nothing in the revenue law purporting to tax the husband as the head of the community for the whole, regardless of its ownership.

In the case of United States vs. Robbins, 269 U. S. 315, the Supreme Court had under consideration the same question involved here, except that it required an interpretation of the community laws of California. It was there pointed out the law of that State, as interpreted by its supreme court, gives to the wife a mere hope or expectancy in the community property prior to the dissolution of the marriage. Roberts vs. Wehmoyer, 191 Cal. 601. But the court, through Justice Holmes, went further in the Robbins case than to pitch it upon the proposition that the wife during marriage did not own any of the community property or its income and took occasion to say that even if "the wife had an interest in the community income that Congress could tax if it so minded it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, etc., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. Garrozi vs. Dastas, 204 U. S. 64." The case thus cited by the Supreme Court arose in Porto Rico and involved the right of the wife after divorce to compel the husband to account for sums found to have been unnecessarily and extravagantly expended in trips to Europe. Justice White, in deciding that the wife could not exact such an account, took occasion to say:

42 "Besides, when it is considered that the ancient Spanish law and the law as formulated in the code of 1889, or in the Porto Rican code of 1902, *confers no authority upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the law of the countries which have followed that code.*" (Italics by the writer of this opinion.)

He then cites a decision of the Supreme Court of Louisiana (Guice vs. Lawrence, 2 La. Ann. 226) as pointing out the similarity of the law of community in Louisiana, the Code Napoleon, and the Spanish law. Justice White also adverts to the later provision of the Porto Rican code, which requires the concurrence of the wife in disposing of the real property of the community, but states that this limitation of power in one direction as to real property had the opposite effect contended by the wife as placing a restriction upon the husband's powers as to the whole community property, for the logical reason that having found it necessary to limit his rights upon real property it followed that his powers as to the movables and funds, having

been excluded from the limitation, were not so restricted. However, there are, under the Louisiana law, both in its codal provisions and as now settled by the decisions of its courts, two decided differences between what the Supreme Court found to be the law of Porto Rico in the Garrozi case, to wit, with respect to the right of the wife to put an end to the community before dissolution of the marriage and as to her relief against the fraudulent disposition of the common property. It is as well settled under the Louisiana jurisprudence as anything can be that the wife during marriage may have the community dissolved whenever the husband has been guilty of

43 mismanagement, his affairs are in disorder, he is dissipated, or has engaged in speculation, and this whether she has or had any paraphernal or dotal property, but merely for the protection of future earnings from her own industry. Davock vs. Darcy, 6 Rob. 342 (1844); Jones vs. Morgan, 6 Ann. 630 (1851); Wolfe & Clark vs. Lowry, 10 Ann. 272 (1855); Mock vs. Kennedy, 11 Ann. 525 (1856); Webb vs. Bell, 24 Ann. 75 (1872); Vickers vs. Block, 31 Ann. 672 (1879); Chaffe vs. Watts, 37 Ann. 324 (1885); Brown vs. Smyth, 40 Ann. 325 (1888); Walmsley vs. Theus, 107 La. 417 (1902); Gastauer vs. Gastauer, 131 La., 1 (1912). Then, as heretofore noted, the last paragraph of art. 2404 of the Louisiana code, makes the husband's estate, including his interest in the community as well as his heirs, liable for the value of her half of the community property which he "has sold * * * or otherwise disposed of * * * by fraud, to injure his wife," in an "action against the heirs." So that while the Garrosi case may have been sound authority in support of the decision of U. S. vs. Robbins, it does not follow that it will sustain a similar conclusion when construing the law of Louisiana. For, in the latter case, Justice Holmes found "he (the husband) may spend it (the community income) substantially as he chooses, and if he wastes it in debauchery the wife has no redress." This is not true in Louisiana. Here, if the wife chooses, she may bring her action at any time when the husband's conduct put her rights in jeopardy and have a dissolution of the community and division of its property, including its funds and income. Gastauer vs. Gastauer, supra.

When the question of whether, in the States of the Union having community laws, husbands and wives might make separate returns of community income first came up, the Attorney General of the United States, in a well-considered opinion, advised the Treasury Department that in all of them save California, this could be done under the revenue laws. That construction was adopted and con-

44 tinued until recently, when this case and others were provoked to obtain a ruling of the courts upon the question in States other than California, after decision in U. S. vs. Robbins. From time to time, efforts have been made in Congress, no doubt at the inspiration of taxpayers in the other States, to have the revenue acts specifically deny the right to make such returns or to permit

the same course to be followed in all of the States, but when the disadvantages of the community system otherwise were weighed against the privilege here claimed these efforts have failed, and the legislative department has permitted the situation to continue in so far as any express statutory change is concerned just as it was, with full knowledge of the views of the Attorney General and the course pursued by the Revenue Department. While this is not conclusive, still it is entitled to great weight as both an administrative and legislative interpretation of the law.

If it should happen in a particular case, for reasons heretofore held sufficient by the courts of Louisiana, that a wife would obtain a dissolution of the community and division of its assets, say at the beginning of a particular year, when the operations of the previous year had produced a substantial income, to require a return alone by the husband of the whole, would be to make both pay a tax upon something which they did not own or possess when making the return at the usual period on March 15th. In other words, the fiction of the community partnership would have ended and its property been divided, but nevertheless, if the Government's contention is correct, the husband would still have to pay upon the whole as if it were his own, when both actually and legally he would not have received it.

My conclusion is that the income of the community belongs jointly to the husband and wife and that the revenue act of 1926 does not require that it be assessed to the husband alone, but each may make a separate return as was done in this case. It follows that plaintiff should have judgment as prayed for. Proper decree may be presented.

Done and signed in chambers at Shreveport, Louisiana, on this the 5th day of December, A. D. 1929.

(Sig.) BEN C. DAWKINS,
U. S. D. J.

IN UNITED STATES DISTRICT COURT

No. 19.500

WILLIAM PFAFF, PLAINTIFF

VERSUS

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Judgment

Dec. 9, 1929

This cause heretofore came on for trial before the court without the intervention of a jury, a jury trial having been waived and all

matters at issue of fact as well as law having been submitted to the court without the intervention of a jury by a written stipula-
46 tion made by the parties and filed with the clerk; and the court having heard the pleadings, the evidence, and the arguments of counsel, being of the opinion that the plaintiff is entitled to the relief prayed for, for the reasons assigned in a written opinion signed under date of December 5, 1929;

It is ordered, adjudged, and decreed that there be judgment in favor of the plaintiff, William Pfaff, and against the defendant, Jacob O. Bender, collector of internal revenue, in the full sum of thirteen hundred and eighty-one and 01/100 ($1,381.01) dollars, together with interest thereon from the date of payment—namely, August 20, 1928—at the rate of six per cent (6%) per annum and all costs of this suit. The court hereby certifies that the taxes and interest sued for in this proceeding were paid by the plaintiff to the defendant, Jacob O. Bender, collector of internal revenue in defendant's official capacity aforesaid; that the action of the defendant in demanding and collecting such taxes and interest was in accordance with the instructions of his superior officer duly appointed, qualified, and acting; that there was probable cause for his action in demanding and collecting such taxes; and that he is entitled to a certificate herein for probable cause, which is hereby given.

Judgment rendered December 9, 1929.

Judgment signed December 9, 1929.

(Signed) BEN C. DAWKINS,
Judge.

47 In United States District Court

[Title omitted.]

Order allowing time to prepare and file bills of exceptions

Entered Dec. 9, 1929

On motion of T. M. Logan Bruns, assistant United States attorney, who on behalf of the defendant hereby duly excepts to the opinion of the court and judgment handed down herein, and on suggesting to the court that in order that the rights of the defendant may be preserved it will be necessary that a period of at least 15 days' time be allowed for the settling and filing of bills of exception herein;

It is ordered by the court that all the rights of the defendant herein be, and they are hereby, preserved, and accordingly that said defendant be allowed fifteen days as time in which to settle and file bills of exception herein.

48 In United States District Court

[Title omitted.]

Petition for appeal and order allowing same

Filed Dec. 23, 1929

To the honorable judge of said court:

Jacob O. Bender, collector of internal revenue, defendant in the above entitled and numbered case, in which a written opinion was rendered and a certificate of probable cause issued, feeling himself aggrieved by the final judgment of this court and the opinion to which it refers, hereby claims an appeal from said judgment and from the whole thereof, with stay of execution under said judgment, to the United States Circuit Court of Appeals for the Fifth Circuit and prays that said appeal may be allowed and the record in this cause duly transcribed and certified to the said United States Circuit Court for the Fifth Circuit, to be heard therein upon the pleadings and proof in this case to the end that the said judgment may be reversed.

(Sgd.) E. E. TALBOT,
United States Attorney.
(Sgd.) T. M. LOGAN BRUNS.
Assistant United States Attorney.

49 Order

The appeal hereinabove prayed for is hereby granted, with stay of execution under said judgment, returnable to the United States Circuit Court of Appeals for the Fifth Circuit on the 10th day of January, 1929.

(Sgd.) BEN C. DAWKINS,
Judge.

December 23, 1929.
Service accepted, citation waived, and all rights reserved.
(Sgd.) MONTE M. LEMANN.
(Sgd.) CHARLES E. DUNBAR, Jr.

In United States District Court

[Title omitted.]

Assignment of errors

Filed Dec. 23, 1929

In the above styled and numbered cause comes now the defendant and respectfully shows that this honorable court has committed

error herein to his prejudice in rejecting his demands, and
50 assign as specifications of such error that the court erred in the following particulars:

In overrruling the motion of defendant for judgment and in not sustaining the same.

Wherefore, defendant prays that the opinion of the court and judgment herein be reversed.

(Sgd.) E. E. TALBOT,
United States Attorney.
(Sgd.) T. M. BURNS,
Assistant United States Attorney.

In United States District Court

[Title omitted.]

Bill of exceptions and order settling same

Filed Dec. 23 1929

Be it remembered that this cause having been regularly
51 assigned for trial was called for trial before the Honorable Ben C. Dawkins, sitting especially in the Eastern District of Louisiana, on the twelfth day of October, 1929, both parties, plaintiff and defendant, announcing ready for trial.

The jury was waived by written stipulation between counsel as provided by section 649, United States Revised Statutes, and the case submitted to the court on an agreed stipulation of facts, said stipulations being contained in one document duly filed as part of the record in this cause.

The trial was then proceeded with, and at the conclusion of argument defendant filed a motion for judgment, made part hereof.

Thereafter, on December 5, 1929, the court handed down a written opinion, which is made a part of the record herein, denying the contentions of defendant, overruling his motion for judgment, and ordering the entry of a judgment in favor of plaintiff as prayed for, said judgment being duly signed the 9th day of December, 1929.

To which rulings and judgment of the court counsel for defendant timely excepted and reserved his bill of exceptions, making the stipulation introduced a part thereof, which bill of exceptions is hereby settled and allowed on this 23 day of December, 1929.

(Sgd.) BEN C. DAWKINS,
United States District Court.

Approved:
(Sgd.) MONTE M. LEMANN,
(Sgd.) CHARLES E. DUNBAR, JR.,
Counsel for Plaintiff.

52 In United States District Court

[Title omitted.]

Pracipe for transcript

Filed Dec. 23, 1929

The clerk will please proceed to make up the transcript in the above numbered and entitled cause, including therein the following:

(1) Plaintiff's petition.
(2) Citation and return thereon.
(3) Defendant's answer.
(4) Stipulation waiving jury and stipulating facts.
(5) Defendant's motion for judgment.
(6) Opinion of the district judge.
(7) Final judgment.
(8) Defendant's timely exception to opinion and judgment of District Court and reservation of time to file bill of exceptions.
(9) Bill of exceptions.
(10) Assignment of errors.
(11) Petition and order of appeal.
(12) Citation waived.
(13) This præcipe; and
(14) Certificate of clerk.

(Sgd.) T. M. LOGAN BRUNS,
Assistant U. S. Attorney,
Of Counsel for Defendant.

53 Approved:
(Sgd.) MONTE M. LEMANN,
(Sgd.) CHARLES E. DUNBAR, JR.,
Attorneys for Plaintiff.

December 26, 1929, clerk's office.

[Clerk's certificate to foregoing transcript omitted in printing.]

54 [Minute entry of argument and submission, Feb. 19, 1930, omitted in printing.]

55 In United States Circuit Court of Appeals, Fifth Circuit

No. 5809

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, APPELLANT

vs.

WILLIAM PFAFF, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Louisiana

Edmond E. Talbot, U. S. attorney, John W. Harrell, asst. U. S. attorney, C. M. Charest, Gen. Counsel, Bureau of Int. Rev., T H.

Lewis, jr., spec. atty., Bureau of Int. Rev., for appellant: Monte M. Lemann, Chas. E. Dunbar, jr. (Spencer, Gidiere, Phelps & Dunbar; Monroe & Lemann on the brief), for appellee.

Before BRYAN and FOSTER, Circuit Judges, and SIBLEY, District Judge

FOSTER, Circuit Judge:

Opinion

Filed Feb. 28, 1930

In this case there is no dispute as to the facts. Appellee, William Pfaff, and his wife are citizens of Louisiana, domiciled in New Orleans, with their matrimonial community under the laws of that State existing. For the year 1927 they made separate returns for
56 Federal taxes, each for one-half of the community income of $30,526.26. Neither had any separate income. The Commissioner of Internal Revenue held that the entire income of the community should have been returned by the husband and determined a deficiency of $1,348.56, which was paid under protest, and this suit followed. The jury was waived and the district court, for reasons given in a well-considered opinion (Pfaff vs. Bender, F. (2d)), which exhaustively reviews the statutes and jurisprudence, both State and Federal, pertinent to the issues presented, held in favor of appellee on the ground that the wife in Louisiana has a vested interest in the community property entitling her to file a separate return for one-half of the community income. We need not review the opinion of the district court and the authorities therein cited. We refer to it with approval, however, as authority for such general statements of the law of Louisiana as are hereinafter made.

Appellant contends that the vested interest of the wife is immaterial, as the husband has dominion and control of the community and should be taxed for the whole of the community income. He relies for reversal upon the decision of the Supreme Court in the case of U. S. vs. Robbins et al., 269 U. S. 315. Whether this decision is controlling is really the only question presented. Of course, considered practically, this involves the amount of taxes to be paid. If the husband must return the whole income, the surtaxes will be greater.

Prior to the decision in the U. S. vs. Robbins, supra, following
57 an opinion by Attorney General Palmer, rendered in 1921 (32 Op. Atty. Genl. 435), construing the revenue act of 1918, spouses in Louisiana and other States having community property laws, except California, were permitted by the Treasury Department to make separate returns of the community income and pay taxes accordingly.

From time to time, as new revenue laws were considered and adopted, attempts were made to incorporate clauses to avoid the effect of Attorney General Palmer's holding, but without avail.

The revenue act of 1926, under which this case arises, is practically identical with previous acts in its provisions as to returns and assessment. It taxes incomes of individuals and permits a wife to make a separate return of her income. In the case of partnerships each member may return his share of the firm's profit as his individual income.

In the case of U. S. vs. Robbins, supra, the Supreme Court held, as did Attorney General Palmer, that in California a wife has merely an expectancy during the existence of marriage with no vested interest in the community property and is not entitled to make a separate return. Had the opinion stopped there the existing rule of the Treasury Department would not have been disturbed in the least. Unfortunately, for the peace of mind of the taxpayer, the concluding paragraph of the opinion went further. The court said:

58 "But the question before us is with regard to the power and intent of the revenue act of February 24, 1919, c. 18, Title II, Part II, pars. 210, 211, 40 Stat. 1057, 1062. Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole. Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See Garrezi v. Dastas, 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he, who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, par. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. Par. 219. See Regulations 65, Art. 341."

It is not seriously disputed that the status of the wife in Louisiana is as pointed out by the opinion of the District Court, but the argument is made, based upon the above-quoted language, that the tax is to be assessed against the husband who has dominion and control over the fund without regard to the State law fixing the vested interest of the wife. This is too broad a construction to place on the opinion. It is obvious that what the Supreme Court said was intended to apply only to conditions similar to those existing in the State of California, as shown in the case under consideration.

In California the wife has no vested interest during the existence of the marriage and therefore no income to return. In Louisiana the wife's interest in the community property is vested at all times and does not require the dissolution of the marriage to come into existence.

59 In California the husband has absolute dominion and control over the community property equivalent to full ownership. If he wastes it in debauchery, the wife has no redress. In Louisiana the husband has dominion and control over the community property, but he must manage it as a prudent administrator. If he wastes it in debauchery, the wife has her remedy to secure a separation of property without disturbing the marriage. If he fraudulently diverts it to his own personal estate, both he and his heirs may be made to account to the wife.

In Louisiana if the husband dies the wife takes by virtue of her ownership and not by inheritance. She pays no inheritance taxes, State or Federal, on her one-half of the community property.

In Louisiana the earnings of the wife enter into the community, Civil Code, art. 2402, and debts contracted by her must be acquitted out of the common fund, Civil Code, art. 240. It is true the wife can not contract without the authority of the husband, express or implied, but a tax is not a debt created by contract. It is created by law and a duty exists to pay it. No authorization by the husband is required for its validity. The wife may stand in judgment with her husband's authorization, Civil Code, art. 121. If he refuses to authorize, the judge may do so, Civil Code, art. 124.

In many respects the matrimonial community existing in Louisiana is similar to a commercial partnership created by contract. It frequently happens that partnerships are created in which one partner has the absolute control and dominion of the affairs of the firm, the sole activities of the other partner consisting in furnishing

60 part of the capital. It could hardly be said that because one partner has the dominion and control of the partnership business that the distributive share of the profits going to the other partner could be added to the individual income of the managing partner for the purpose of computing taxes.

There is slight difference, if any, in Louisiana between the authority and liability of the husband in community and that of a trustee or guardian. While they are required to make returns for their charges, no one would say that the income of the ward or cestui qui trust should be added to the individual income of the guardian or trustee for the purpose of computing his taxes.

We think the decision in U. S. vs. Robbins should be held to refer only to cases where the conditions are similar to those existing in California and that it is not applicable to community property states such as Louisiana.

Affirmed.

61 In United States Circuit Court of Appeals, Fifth Circuit

No. 5809

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE

VERSUS

WILLIAM PFAFF

Judgment

Feb. 28, 1930

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

62 In United States Circuit Court of Appeals

[Title omitted.]

Order staying mandate

Filed March 15, 1930

On consideration of the application of the appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed until May 28, 1930, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that before May 28, 1930, there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, and that due proof of service of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or after May 28, 1930, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 15th day of March, 1930.

(Signed) N. P. BRYAN,
United States Circuit Judge.

63 [Clerk's certificate to foregoing transcript omitted in printing.]

64 In Supreme Court of the United States

Order allowing certiorari

Filed May 26, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, and the case is advanced and assigned for argument on Monday, October 20th next, immediately following case No. 821, Hopkins, Collector of Internal Revenue, vs. Bacon.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 34954. United States Circuit Court of Appeals, Fifth Circuit. Term No. 86. Jacob O. Bender, collector of internal revenue, petitioner, vs. William Pfaff. Petition for writ of certiorari and exhibit thereto. Filed April 17, 1930. File No. 34954.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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APR 17
CHARLES ELMORE

No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1929

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

WILLIAM PFAFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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107710—30

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. ——

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

WILLIAM PFAFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Attorney General, on behalf of Jacob O. Bender, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 28, 1930, affirming the decision of the United States District Court for the Eastern District of Louisiana.

QUESTION PRESENTED

Whether a husband domiciled in the State of Louisiana may properly be required to report in his separate income-tax return for 1927 the entire community income of himself and his wife; or, to

state it another way, whether the wife has such an interest in the community income that she has a right to report one-half of such income in her separate return.

STATEMENT

The respondent married in 1891 and ever since has resided with his wife in the State of Louisiana. At the time of their marriage neither had any property or pecuniary rights and neither of them has since acquired any paraphernal or separate property. (R. 18, 19.)

After their marriage and prior to January 1, 1927, the respondent and his wife accumulated community funds which were invested in real estate situated in the City of New Orleans, stocks and other personal property, title to which was in the respondent's name. (R. 19.)

During the year 1927 respondent and his wife received community income as follows (R. 19):

Rents and royalties from community real estate	$11,232.65
Dividends on community stocks	3,142.25
Salary of the respondent as an officer of two corporations	27,025.00

No other income was received by the respondent and his wife during 1927. One half the income was reported in the respondent's separate income tax return for 1927 and the other half in his wife's separate return for that year. Deductions were also divided equally between them. (R. 19, 20.)

Upon review and audit of these returns the Commissioner of Internal Revenue determined that the entire income should have been reported

by the respondent, that all the deductions should have been taken by him, and that his tax should be computed upon this basis and paid by him. Accordingly, an additional assessment of $1,348.50 was duly made against the respondent and was paid by him to the petitioner as Collector of Internal Revenue for the District of Louisiana, together with interest in the sum of $32.51, making a total of $1,381.01, for the recovery of which this suit was brought. (R. 10, 22–23.)

The District Court entered judgment for the respondent. (R. 46.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the lower court. (R. 57.)

STATUTES INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part, as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)

SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)

SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the

person or property of such taxpayer. (U. S. C. App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period. Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964a.)

The applicable provisions of the Louisiana statutes will not be quoted. The principal provisions, however, will be found in Articles 2399–2437, Merrick's Revised Civil Code of Louisiana, Third Edition.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Louisiana the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income, that she and her husband are permitted to divide the community income between them in separate returns.

REASONS FOR GRANTING THE WRIT

This is a test case upon the decision of which the taxability of income derived from community property defined and held under the laws of the State of Louisiana will depend.

Burns Poe, Collector of Internal Revenue for the District of Washington, v. *H. G. Seaborn* (No. 492 on the Docket of this Court for the present Term), a case brought here on certificate from the Circuit Court of Appeals for the Ninth Circuit, concerns the taxability of income derived from community property in the State of Washington. In *George C. Hopkins, Collector of Internal Revenue, Petitioner,* v. *C. W. Bacon,* a petition is filed coincidentally herewith for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment of that court determining that the husband may not be required to pay an income tax upon more than half the entire net income derived from community property in Texas. The instant case presents similar questions with reference to the taxation of income derived from community property in Louisiana. In all three of these cases the taxes in dispute were assessed in accordance with *35 Ops. Atty. Gen., 265,* and they are all test cases brought to determine the applicability to the taxation of income from community property in Washington, Texas and Louisiana of the principles established in *United States* v. *Robbins,* 269 U. S. 315, which dealt

with the taxability of income derived from community property in California. While there are certain differences in the laws of these States which may be deemed to affect the husband's power of disposition and control over community property and income, they are not thought sufficient to warrant a conclusion different from that reached by this Court in the *Robbins case*.

Either the *Robbins case* is controlling, and the judgment below is erroneous, or the method of taxing income derived from community property defined and held under the laws of Louisiana is a question which has not been determined by this Court. Because of the importance of this question as affecting the revenue to be derived from taxation upon the income of all such property in the State of Louisiana it is thought that the writ should issue, to the end that there may be an authoritative decision of this Court upon the questions involved.

Wherefore it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

APRIL —, 1930.

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CHARLES ELMORE

No. 86

In the Supreme Court of the United States

OCTOBER TERM, 1930

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238 ---- 8, 10

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana (R. 16–26) is reported in 38 F. (2d) 642. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 31–33) is reported in 38 F. (2d) 649.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1930. (R. 34.) Petition for certiorari was filed April 17, 1930. Certiorari

was granted May 26, 1930. (R. 35.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the entire community income for the year 1927 of a husband and wife domiciled in the State of Louisiana is taxable as the income of the husband; or, to state it another way, whether the wife has such an interest in the community income that she has the right to report one-half of such income in her separate return.

STATUTES INVOLVED

The relevant portions of the statutes involved will be found in the Appendix, *infra,* pp. 46-49.

STATEMENT

The case was tried in the District Court on an agreed statement of facts, a jury trial having been waived in writing. The facts as stipulated are substantially as follows:

The respondent has always been a citizen of the United States and a resident of the State of Louisiana. He was married on October 21, 1891, and since then he and his wife have resided together in that State. (R. 10.)

Neither owned any property or pecuniary rights at the time of their marriage and neither has since acquired any paraphernal or separate property. (R. 10.)

Prior to January 1, 1927, the respondent and his wife had accumulated a considerable amount of property consisting of real estate in the city of New Orleans, stocks of various corporations and other personal property. The title to all of the property referred to stood in the name of the respondent. It is admitted that such property and all of the income derived therefrom constituted the community property of the respondent and his wife. (R. 11.)

The gross income of the respondent and his wife consisted of the following items (R. 11):

Rents and royalties from community real estate	$11,232.65
Dividends on community stocks	3,142.25
Salary of respondent as an officer and employee of several corporations	27,025.00
	41,399.90

Allowable deductions for the year amounted in the aggregate to $10,873.64. (R. 11.)

The respondent and his wife filed separate income tax returns for 1927 in which each reported a gross income of $20,272.61, allowable deductions of $5,009.48 and a net income of $15,263.13. The respondent's return showed a tax due of $341.55 and the wife's return, a tax due of $430.17. These amounts were paid. (R. 12.)

It is conceded that all of the income reported in the returns of the husband and wife constituted community income and that if the respondent and his wife were entitled to report the community income and deductions in the manner indicated the

liability disclosed by their returns was correct. (R. 12.)

Upon the audit of the returns, the Commissioner of Internal Revenue determined that the entire income in question should have been reported by the respondent, that all the deductions should have been taken by him, and that his tax should be computed accordingly. Thereafter an additional assessment of $1,348.50 was duly made against the respondent and was paid by him under protest to the petitioner, as Collector of Internal Revenue for the District of Louisiana, together with $32.51 interest, making a total payment of $1,381, for the recovery of which a claim for refund was duly filed. (R. 12–13.)

Upon the rejection of the claim this suit was brought. (R. 13.)

The District Court entered judgment for the respondent. (R. 26.) Upon appeal the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the lower court. (R. 34.)

This Court granted certiorari on May 26, 1930.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that under the laws and judicial decisions of the State of Louisiana the husband has such control over the community income that he should properly be required to report all of such income in his Federal income tax return for 1927.

2. In holding that the wife has such an interest in the community income that she and her husband are permitted to divide the community income between them in separate returns.

SUMMARY OF ARGUMENT [1]

This Court in the case of *United States* v. *Robbins,* 269 U. S. 315, held that a married man domiciled with his wife in the State of California should be taxed upon all of their community income, basing its decision in part on the fact that the husband alone could dispose of the fund and exercise exclusive rights of management and enjoyment over it.

In *Corliss* v. *Bowers,* 281 U. S. 376, this Court again emphasized that the individual might be taxed on income which he had the right to control and enjoy irrespective of whether he held any title whatever to the fund from which it was derived.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts. The *Corliss case* involved the constitutionality of Section 219 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), providing for the taxation of the income of revocable trusts to the grantors. Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32

[1] The following material to stars on p. 6 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

(U. S. C. App., Title 26, Sec. 960), provides for taxing the income of certain types of trusts to the trustees, the income of other types to the beneficiaries, and the income of revocable trusts to the grantors.

Sections 210 and 211 of the Revenue Act of 1926, *infra*, p. 46, construed as similar provisions were construed in the *Robbins case*, do not require the taxation of income to the individual having purely formal rights of ownership. Their intent is that the tax shall fall upon the person exercising substantial rights of dominion and enjoyment.

In the *Robbins case* the rights of dominion and enjoyment were measured by very practical tests as to what the husband and wife could do with respect to the community income. The possession of unimportant rights by the wife will not suffice to prove that one-half of the community income should be taxed to her, for wives in States not having the community property system also may restrict to a certain extent the husband's disposition of his property and income. The Act should, if possible, be so construed and applied as not to give married taxpayers residing in the community-property States an undue advantage over married taxpayers residing in other States.

* * * * * [2]

During the existence of the community the Louisiana husband alone has unrestricted power

[2] See footnote 1, p. 5.

to make contracts and bring suits relating to community property and to sell or otherwise dispose of it except for a limitation upon his power to make gifts and a prohibition against his defrauding his wife.

The community property is subject to the payment of the separate debts of the husband incurred during the existence of the community, but is not liable for the separate debts of the wife, and the husband and his separate estate become personally liable for all community debts whenever there is an insufficient amount of community property to pay them.

The wife has no power to make contracts or create obligations relating to the community without her husband's consent. She is not personally liable for the community debts during the existence of the community and upon its dissolution by divorce, by separation from bed and board, or by separation of property made by judicial decree under Article 2425 of the Revised Civil Code of Louisiana, *infra,* the wife may avoid becoming liable for any of the community debts by renouncing the community or by consenting to accept, under inventory, one-half of the community remaining after the payment of community debts.

The wife can put an end to the community by securing a divorce, a separation from bed and board, or a separation of property under Article 2425, *infra,* but she has no remedy against the hus-

band for mismanagement of the community property without dissolving the community. She cannot substitute her management of the community property for his, interfere with his management or demand a share of the community income. Accordingly, the husband has all of the present power over the community income and should be taxed upon the entire amount.

ARGUMENT

I

Preliminary Statement [3]

The Treasury Department, following two opinions of the Attorney General, 32 Op. A. G. 298, 435, originally conceived that the characterization of the wife's interest in community property as vested or expectant determined whether the husband and wife might divide the community income between them in separate returns or whether the husband should be required to report the entire amount in his return. See T. D. 3071, Internal Revenue Cumulative Bulletin, No. 3, p. 221; T. D. 3138, Internal Revenue Cumulative Bulletin, No. 4, p. 238. It was accordingly held that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada, New Mexico,

[3] The entire argument under Points I and II is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

and Idaho should be permitted to divide the community income between them in separate returns, while a similar privilege was denied to married taxpayers domiciled in California.[4]

Subsequently this Court, in the case of *United States* v. *Robbins,* 269 U. S. 315, indicated that the question as to whether community income shall be taxed to the husband alone or to the husband and wife in equal shares can not be made to depend solely upon whether the wife's interest is vested or expectant, and that in California, where the husband has substantially the sole right to control and enjoy the community property, the community income is properly taxed to him.

Following the decision in the *Robbins case,* the opinions of the Attorney General as to the taxation of income in the community property States were withdrawn (35 Op. A. G. 265), with the recommendation that the Treasury Department take action which would furnish grounds for the commencement of test suits to determine the proper method of taxing community income, the case at bar being one of the cases which has resulted from such action.

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[4] This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*, p. 47. That section was not intended to apply to taxes for subsequent years, and has no bearing on the question here involved.

II

Where the Husband Has Control Over and the Right to Enjoy the Entire Community Income He Is Required to Include It in His Return for Federal Income-Tax Purposes

In general terms the statute imposes the tax "upon the net income of every individual" without specification of what is included in these words. There is no reference in the statute to income from community property.[5] Such generality is unavoidable in Federal income tax laws intended to have uniform application throughout the States where the definitions of property rights and titles vary with the local laws. The view originally held in the Treasury Department and in the Department of Justice (T. D. 3071, *supra;* T. D. 3138, *supra;* 32 Op. Atty. Gen. 298, 435, *supra*) that the wife has an interest in income from community property equal to that of her husband and should therefore be permitted to report one-half of it in her return was based upon local conceptions of title to the fund

[5] It is of interest that while the Revenue Acts of 1921 and 1924 were being drafted it was proposed that there should be included in them a provision for the taxation of community income to the spouse having the right of management and control. See Report of the Committee on Ways and Means of the House of Representatives, Report No. 350, 67th Congress, First Session, p. 11, and Conference Report No. 486 of the same Congress, p. 21; Hearings before the Committee on Ways and Means, House of Representatives, 68th Congress, First Session, Revenue Revision, 1924, pp. 194, 348, 349, 375, 478, 482. These proposals were defeated.

rather than of dominion and control of the income therefrom. The contention that the person who has formal title to a fund or to income therefrom must pay the tax when the power of disposition is vested in another finds no support in the language of the statute. Indeed the very generality of the words employed suggests that they are to be understood in their ordinary meaning implying dominion and control and not in any narrow, technical sense implying formal, legal, or equitable ownership.

Section 1 of the Revenue Act of 1916, c. 463, 39 Stat. 756, levied a tax "upon the entire net income received in the preceding calendar year from all sources by *every individual.*" (Italics ours.) Sections 1 and 201 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 303, imposed certain taxes upon the net income *"of every individual."* (Italics ours.) Subsequent Revenue Acts have likewise employed the phrase "of every individual." See Sections 210 and 211 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the statute involved in the *Robbins case, supra,* and Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 46.

Nowhere in the Revenue Act of 1926 nor in any previous Revenue Act have there been set forth the proprietary rights which an individual must have in particular income to become liable for the tax thereon. The tax is imposed upon the income of individuals, and the application of this language

to specific cases is to be made as they arise. In this process the *Robbins case* points the way. It does not hold that the principle of taxing income to the "owner" of the income is to be discarded, but rather that ownership in the statutory sense must be tested, in cases of community ownership, by the enjoyment of practical rights of ownership and not by words describing the interests of husband or wife or of "the community" as "vested" or "expectant," "legal" or "equitable."

In its opinion in the *Robbins case* this Court said (p. 327):

> But the question before us is with regard to the power and intent of the Revenue Act of February 24, 1919, c. 18, Title II, Part II, Sections 210, 211; 40 Stat. 1057, 1062. *Even if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole.* Although restricted in the matter of gifts, &c., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi* v. *Dastas*, 204 U. S. 64. His liability for his wife's support comes from a different source and exists whether there is community property or not. *That he may be taxed for such a fund seems to us to need no argument. The same and further considerations lead to the conclusion that it was intended to tax him for the whole.* For

> not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code, Sec. 167, so that the remedy for her failure to pay might be hard to find. The reasons for holding him are at least as strong as those for holding trustees in the cases where they are liable under the law. Sec. 219. See Regulations 65, Art. 341. (Italics ours.)

Again, in the case of *Corliss* v. *Bowers*, 281 U. S. 376, this Court recognized that the legal estate was in the trustee and the equitable interest was in the grantor's wife, but nevertheless held the grantor to be taxable upon the income under Section 219 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), which provides for the taxation of the income from revocable trusts to the grantor. In holding this provision to be constitutional, the Court said (p. 378):

> But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point

> of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here, although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Salstonstall* v. *Salstonstall,* 276 U. S. 260, 271. *Chase National Bank* v. *United States,* 278 U. S. 327. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.

Sections 210 and 211 of the Revenue Act of 1926, *infra,* p. 46, construed as the corresponding sections of the Revenue Act of 1918 were construed by the Court in the *Robbins case,* do not require the taxation of income to the individual having purely formal rights of ownership, their intention being to tax the person having the substantial right to exercise control and enjoyment of the income.

Taxation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a

principle which is recognized in various provisions of the Revenue Acts. The *Corliss case*, as previously indicated, involved the constitutionality of a statute taxing the income of a revocable trust to the grantor. Congress has also provided for the taxation of the income of trusts to the beneficiaries in cases where the income is distributable to them and for the taxation of the income of other trusts to the trustees. See Section 219 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32 (U. S. C. App., Title 26, Sec. 960), and the corresponding provisions of earlier statutes. This device for the taxation of the income from trusts was in effect prior to the decisions in the *Robbins case* and the *Corliss case*. Thus Congress itself did not intend that the imposition of a tax on the net income "of every individual" should always require that the holder of the legal title be taxed or that the holder of the equitable title be taxed, but rather that in proper cases the tax should be imposed upon the person having control of the income.

Not only have the *Robbins* and the *Corliss cases* established the principle that the individual is taxed upon income over which he can exercise rights of dominion and enjoyment rather than upon income to which he has a bare legal or equitable title, but the *Robbins case* has measured the rights of dominion and enjoyment by exceedingly practical tests. It is emphasized in that decision, for example, that the husband alone had the disposition

of the fund; that he might spend it substantially as he chose, and that if he wasted it in debauchery the wife had no redress; that his liability for his wife's support came from a different source and existed whether there was community property or not, and that the community property, while liable to be taken for his debts, was not liable to be taken for his wife's.

An application of the same principle was made in *Lucas* v. *Earl,* 281 U. S. 111, where it was held that an agreement, assumed to be valid, between husband and wife domiciled in California that each should have an equal joint interest in all their earnings could not operate to make one-half of his salary taxable to her as her income because he earned the income and had the right to collect it.

In any event, under these decisions it is settled that the rights of ownership which the person taxed must be able to exercise are substantial rights and among such substantial rights are the rights of disposing of the income or the source of the income and the right to control the use of the income.

This test rests solidly upon the controlling purpose of the law to create a national system for the taxation of incomes without discrimination between taxpayers in the several States. The imposition of the tax "upon the net income of every individual" implies uniformity and equality in administration. But there can be neither unless the law looks through formalities of title to the rights

and powers of individual taxpayers in controlling and disposing of income received. "The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions." *Tyler* v. *United States,* 281 U. S. 497, 503. If married persons in the State of Louisiana, because of their community of interest in property which either may acquire during wedlock, are taxed upon their incomes at lower rates than married people in other States who enjoy substantially the same rights and powers with respect to the control and disposition of income, the purpose of the law will be defeated. The family is the social and economic unit upon which the burden of the tax must fall and the injustice of such inequalities in the administration of the law is apparent. Unless the tax falls ratably upon all income over which the taxpayer exercises dominion and control, uniformity in administration is unattainable and inequality becomes inevitable. Such results are to be avoided if language permits. *Boston & M. R. R. Co.* v. *United States,* 245 Fed. 578 (C. C. A. 1st), certiorari denied, 255 U. S. 577; *United States* v. *Childs,* 266 U. S. 304, 309. The test that he who has the power of disposition should bear the burden of the tax finds support in the general language of the statute and to so construe it effectuates the purpose of the law. Furthermore, this test is appropriate to the power and purpose of Congress in the imposition of taxes to deal

with the substance of things regardless of formal legal fictions, a purpose which this Court has often recognized. *United States* v. *Robbins*, 269 U. S. 315; *Corliss* v. *Bowers*, 281 U. S. 376; *Tyler* v. *United States*, 281 U. S. 497; *Chase National Bank* v. *United States*, 278 U. S. 327; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339.

It is necessary, therefore, to examine the laws and the judicial decisions of the State of Louisiana and to determine what substantial rights of ownership the husband and wife may exercise; that is, precisely what the husband may do and what he has a right to have done with respect to community property and income, and to make a like determination with regard to the wife.

III

Under the Laws and Judicial Decisions of the State of Louisiana the Husband's Interest in the Community Income Is Such that He Should Properly Be Required to Report the Entire Amount in His Return; the Wife's Interest Is Not Such That She Should Be Permitted to Report One-half of the Community Income in Her Return [6]

The decision must turn upon consideration of the laws of the State affecting community property and of the respective rights of the husband and

[6] The following material to stars on p. 23 is common to all of our briefs in *Poe* v. *Seaborn*, No. 15; *Hopkins* v. *Bacon*, No. 84; *Bender* v. *Pfaff*, No. 86; *Goodell* v. *Koch*, No. 106.

wife to have control and dominion over such property and its income. But in approaching this consideration it is necessary to bear in mind that certain limitations upon the husband's power to deal, even with his own property, universally arise from the marital relationship and the husband's obligation to support his wife and make provision for her support after his death. Thus a limited right in the wife to bind the community by contacts for necessities is not a substantial right and should be disregarded, for it is comparable to the right which the wife had at common law to obtain necessities on the credit of the husband and to bind his separate property. *McFerren* v. *Goldsmith-Stern Co.*, 137 Md. 573, and cases cited. Nor is a limited right to prevent a particular disposition of the community income or property by the husband important, for similar rights are enjoyed by wives in States which do not have the community-property system. There is, for example, a Utah statute providing that no assignment of the husband's wages shall be valid unless assented to by the wife in writing. Compiled Laws of Utah, 1917, Par. 4385. It would scarcely be urged that the possession of such rights by a wife would afford sufficient reason for taxing a part of the husband's income to the wife.

Nor would it be important if the wife could prevent her husband from disposing of more than one-half of the common property by will. This

gives the wife no greater right (except as to the amount) than she has in Oklahoma where the husband is prevented from bequeathing away from his wife so much of his estate that she would receive less than what would be obtained by succession at law. Act of April 9, 1925, amending Section 11224 of the Compiled Statutes of Oklahoma, Session Laws, 1925, p. 30.

Similarly, in Minnesota (omitting reference to some unimportant exceptions and special provisions) the widow is entitled—subject to the payment of the husband's debts and expenses of administration—to one-third of the personal property then belonging to his estate and one-third of all real estate (other than the homestead, in which she is entitled to a life estate) of which he shall have been seized during coverture, the conveyance of which she has not assented to in writing. General Statutes, Minnesota, 1923, Sections 8718–8720, 8726.

So far as we have been able to ascertain every State in the Union which does not have a community property law, with the exception of North Dakota and South Dakota, makes some positive provision for the widow in relation to the husband's real estate and even the States mentioned protect the wife's interest in the homestead. In practically all States, provisions which give to the wife the assurance of receiving a certain proportion of the husband's real estate upon his death are accom-

panied by provisions which prevent him from conveying his real estate without her consent during his life in such a way as to defeat her dower or other statutory interest.

In the consideration of the local law, local "refinements of title" should be ignored and enquiry should be directed, in the language of the *Corliss case,* to "actual command" of the income taxed, so that, in accordance with the decision in the *Robbins case,* the statutory intent that he who has all the power shall bear the burden may be accomplished. This enquiry will find conclusive answer in the statutes and prevailing decisions of the State, but the subject matter is of ancient origin and the precedents should be read with the prevailing conception of the husband's right of command over community property and income always in mind. For this purpose no better statement can be found than what was said by this Court in *Garrozi* v. *Dastas,* 204 U. S. 64, 78:

> The question, therefore, is this: Is the power of the husband, as the head and master and administrator of the community, in its nature so restricted that in the absence of express limitation he can, after the dissolution of the community, be called to account and compelled to return to the community money which he has actually expended during the existence of the community, because, in the judgment of a court, such expenses may be deemed to have been not

suitable to his situation in life, extravagant, or even reckless? To answer this question in the affirmative would be to destroy the whole fabric of the community system as prevailing, not only under the Spanish and Porto Rican Codes, but as obtaining in those countries of the continent of Europe and here where that system prevails. We need not consider whether the community was derived from the Roman law, from an express provision of the early Saxon law, or from the ancient customary law of the continent. For, however derived, the very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife on the dissolution of the marriage an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valueless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent. (See a very full citation of authority in Journal du Palais Repertoire, verbo, communauté, 739, 741, *et seq.*)

> In determining the authority of the husband as to the common property two considerations are essential: The character of the right of the wife to the common property during the existence of the marriage and the scope of the power of the husband during the same period.

With these preliminary considerations in mind, we turn to the statutes and judicial decisions of the State of Louisiana which disclose the rights of the spouses to control and enjoy community property and its income.

* * * * * [7]

A preliminary statement of certain outstanding features of the community property system of Louisiana will serve to make more intelligible the rights of dominion and enjoyment possessed by the husband under that system.

The community of acquets and gains exists between a husband and wife domiciled in Louisiana unless they agree in their marriage contract that it shall not exist or by agreement prior to marriage limit or modify the community system. See Articles 2332, 2392, 2399, 2400, 2401, and 2424 of the Revised Civil Code, *infra; Succession of Le Besque,* 137 La. 567. The husband and wife can not by voluntary agreement alter the community of acquets and gains after the marriage. Once established, it exists by operation of law until dissolved by death, by divorce, by separation from bed and board or

[7] See footnote 6, p. 18.

by a judicial decree making a separation of property in the wife's suit for such a separation instituted under Article 2425 of the Revised Civil Code, *infra*. *Guillot* v. *Guillot*, 141 La. 86.

Under Articles 2334 and 2404, *infra*, the community property includes all property acquired by either spouse during their marriage other than property acquired with separate funds or by inheritance, or by donation made to him or her particularly. It includes the profits and revenues derived from community property, the products of the labor of husband and wife, except earnings of the wife while she is living separate and apart from her husband, or is conducting a trade or business independently of him, and the revenues and profits of the separate property of both spouses except those from the wife's paraphernal property where such property is administered by the wife separately. Articles 2383, 2386, 2402, *infra*. In Louisiana, as in Washington, Arizona, and Texas, there is a presumption that all property acquired during coverture is community property. Article 2405, *infra*; *Busby* v. *Busby*, 168 La. 510.

The Supreme Court of Louisiana has not consistently held that the wife has a present or vested interest in the community property during the existence of the community, but the majority of its later decisions have adopted that view. *Succession of May*, 120 La. 692; *Phillips* v. *Phillips*, 160 La. 813, and cases cited. See *Liebman* v. *Fontenot*,

275 Fed. 688 (W. D. La.). See *contra, Jacob* v. *Falgoust,* 150 La. 21, and cases cited.

Articles 915 and 916 of the Revised Civil Code, *infra,* recognize the right of the husband or wife to dispose of his or her share of the community property by will. But all that either may devise is a one-half interest in the community property existing at the time of the death and remaining after the payment of the community debts. *Succession of May, supra; Theall* v. *Theall,* 7 La. 226; *Thompson* v. *Vance,* 110 La. 26; *Ramsey* v. *Beck,* 151 La. 190. If there is no will, the surviving spouse, under the conditions set forth in Articles 915 and 916, inherits the one-half interest of the other spouse. The rights of the surviving wife and the surviving husband are identical in this regard.

The Louisiana community property system has certain unique features, particularly with reference to the rights of the spouses upon the dissolution of the community. The statute, for example, gives the court awarding a decree of divorce no discretion as to the division of property such as exists under similar circumstances in Washington, Arizona and Texas. See our briefs in the cases of *Poe* v. *Seaborn, supra; George C. Hopkins, Collector of Internal Revenue,* v. *C. W. Bacon;* and *Fred O. Goodell, Collector of Internal Revenue,* v. *I. B. Koch,* Nos. 15, 84 and 106, respectively, on the docket of this Court for the present term. As will be pointed out later, the wife upon dissolution of

the marriage has a certain power to accept or reject the community, but if the wife does not renounce it the court, when it directs a division of the community property, must award one-half to each. Article 2406, *infra.*

Another unique feature is the doctrine of reimbursement under Article 2408 of the Revised Civil Code, *infra,* which provides that where the separate estate of one of the spouses is enriched at the expense of the community, the other spouse may be given an adjustment equivalent to one-half of the value of the increase when the community is dissolved for any cause. This statutory right to reimbursement exists "if it be proved that the increase of ameliorations be the result of the common labor, expenses or industry" but does not exist "if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade."

If instead of enrichment by purchase the enrichment consists of improvements, it is not the cost of the improvements but the enhanced value of the property constituting the separate estate which constitutes the basis of the claim for reimbursement. *Dillon* v. *Freville,* 129 La. 1005; *Succession of Goll,* 156 La. 910.

Similarly, the community may be enriched at the expense of the separate property of one of the spouses and the enrichment give rise to a claim for reimbursement by one spouse against the other

upon dissolution of the community. For example, in *Whittington* v. *Heirs of Pegues,* 165 La. 151, it was held that where a married woman with the authority of her husband purchased real estate, the presumption that the purchase was for the benefit of the community was not affected by the fact that the purchase price was paid from her separate estate, and that the property became community property, but that the wife acquired a claim for reimbursement against the husband upon dissolution of the community. Similarly, the husband who expends his separate funds on the community property loses his investment to the community, but may acquire a right to reimbursement upon the dissolution of the community if the enhanced value is proved with reasonable certainty. *Munchow* v. *Munchow,* 136 La. 753. There is no accounting upon any claim for reimbursement prior to the dissolution of the community. *Falconer* v. *Falconer,* 167 La. 595.

But these features of the community property system of Louisiana are only important as a background for the determination of the real issue here involved; namely, the relative rights of dominion and control which each spouse exercises with respect to community property and income.

(A)

DURING THE EXISTENCE OF THE COMMUNITY THE HUSBAND ALONE HAS UNRESTRICTED POWER TO MAKE CONTRACTS AND BRING SUITS RELATING TO COMMUNITY PROPERTY AND TO SELL, MORTGAGE, OR OTHERWISE DISPOSE OF IT EXCEPT BY GIFT OR WITH INTENT TO DEFRAUD HIS WIFE

Article 107, Code of Practice, *infra.*
Article 2404, Revised Civil Code, *infra.*
Mitchell v. *Dixie Ice Co.*, 157 La. 383.
Kelly v. *Robertson*, 10 La. Ann. 303, 310.

Under Article 2404 of the Revised Civil Code, *infra,* the husband alone is "the head and master of the partnership or community of gains." During the existence of the community he administers the community property and disposes of the revenues which the community property produces. He may alienate community property "by an onerous title," that is, for consideration, without the consent and permission of his wife.

The right to alienate exists with reference to community real estate as well as personal property. There is no general provision in the Code of Louisiana, such as exists in certain other community property states, requiring the wife to join in the conveyance of the community real estate, and he may dispose of it without even consulting her. *Demarets* v. *Demarets,* 144 La. 173. The only exception is that when title to community property is in the wife's name it cannot be mortgaged or sold without her consent. Article 2334 of the Revised Civil Code, *infra; Gorlick* v. *Dalbey,* 147 La. 18. In any

case, the husband owes the wife no accounting of his disposition of the proceeds of the sale of community property or of the revenues derived from it during the existence of the community. *McCaffrey* v. *Benson,* 40 La. Ann. 10, 16; *Falconer* v. *Falconer, supra.*

The husband is the only legal representative of the community. *Kelly* v. *Robertson,* 10 La. Ann. 303; *Le Rosen* v. *North Central Texas Oil Co.,* 169 La. 973. Under Article 107 of the Code of Practice all actions for damages to the community property or business must be brought by the husband. See *Mitchell* v. *Dixie Ice Co., supra.* Under most circumstances he alone can create community debts. *Luthy* v. *Phillips Wertein Co.,* 163 La. 753.

The limitations on the husband's power of disposition have been defined in Article 2404, *infra,* as follows:

> He can make no conveyances *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.
>
> Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

> But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one half of the property, on her satisfactorily proving the fraud.

The above-quoted provision makes it clear that the husband can not give away community real estate except for the establishment of the children of the marriage. The situation as to personal property is not so clear, for the first and second paragraphs appear to be in conflict. While no State Court decision reconciling these provisions has been found, it appears that a reasonable construction is that the husband can not give away all or substantially all of the community personal property unless the gift be for the establishment of the children of the marriage, but that, as stated by the District Court (R. 21), "he may nevertheless so dispose of particular objects or things of that class by particular title to whomsoever he may choose."

It is of interest that Article 2404, *infra,* was amended in 1926 by the addition of the explanatory sentence, "A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor." Prior to the addition of this sentence it was held in *Thompson* v. *Societe Catholique D'Education, etc.,* 157 La. 875, that a conveyance was not by a "gratuitous title" where the husband conveyed

community property to a Catholic society conditioned upon the property being used for educational purposes under the direction of the Jesuit Fathers. No case has been found which has been decided since the amendment of 1926, but the amended provision apparently limits the husband's right of disposition, except where disposition by a "gratuitous title" is permitted, to cases where he personally receives a valuable consideration.

In addition to the statutory restraint upon gifts made by the husband he is prohibited by Article 2404, *infra*, from making any disposition of the community property by fraud to injure his wife.

There are no other consequential restrictions upon his power to enjoy and dispose of the community property and income during the existence of the community, unless the fact that he may not assign his wages without his wife's consent is so considered. Act 102 of 1916, *infra*.

All the other checks upon his power arise in connection with the dissolution of the community and will be dealt with in discussing the protection given to the wife.

(B)

THE COMMUNITY PROPERTY IS SUBJECT TO THE PAYMENT OF THE SEPARATE DEBTS OF THE HUSBAND INCURRED DURING THE EXISTENCE OF THE COMMUNITY; BUT IS NOT LIABLE FOR THE DEBTS OF THE WIFE

Article 2403, *infra*.

Kelly v. *Robertson, supra.*

Marshall v. *Mullen and others,* 3 Robinson 328.

Article 2403, *infra*, specifically provides that the community property is not liable for the payment of debts contracted by husband and wife prior to marriage but that "the debts contracted during the marriage * * * must be acquitted out of the common fund."

This provision does not in express terms discriminate between the debts of the husband and the debts of the wife, but no case has been found in which this language has been construed as applying to separate debts incurred by the wife during coverture. This may be explained by the fact that it was not until 1916 that the wife had any independent authority to enter into contracts or to incur obligations with respect to her separate property. See p. 35, *infra*. Her husband was even liable with her for her debts incurred as a public merchant. See Article 131 of the Revised Civil Code, *infra*; *Querouze* v. *Capmartin*, 40 La. Ann. 262.

In view of the restrictions which existed as to the wife's power to contract and to incur obligations when Article 2403, *infra*, was enacted, the better view is that the provision making the community property liable "for the debts contracted during the marriage" did not relate to separate debts of the wife. This was, in fact, conceded by the respondent in the courts below.

The situation is different with respect to the husband. It has always been recognized that the community property may be reached for the payment

of the separate debts of the husband. *Marshall* v. *Mullen and others, supra; Succession of Curtis,* 10 La. Ann. 662. See *Kelly* v. *Robertson, supra,* p. 310; *Succession of M., S. & P. Cason,* 32 La. Ann. 790, 792. The case of *Glenn* v. *Elam,* 3 La. Ann. 611, may at first appear to be *contra,* but it relates to debts of the husband which were incurred before marriage.

The rights of the separate creditors of the husband, however, are subordinated to the creditors of the community. *Thompson* v. *Vance,* 110 La. 26.

(C)

THE HUSBAND AND HIS SEPARATE PROPERTY ARE PERSONALLY LIABLE FOR ALL COMMUNITY DEBTS

Succession of McCloskey, 144 La. 438.
Beck v. *Natalie Oil Co.,* 143 La. 153.
Hawley v. *Crescent City Bank,* 26 La. Ann. 230.

The Supreme Court of Louisiana has unequivocally stated that the husband, as head and master of the community, is personally liable for its debts. *Succession of McCloskey, supra,* p. 445. His separate property may be seized and sold for their satisfaction. In the case of *Hawley* v. *Crescent City Bank, supra,* cited with approval in *Beck* v. *Natalie Oil Co., supra,* the Supreme Court of Louisiana said (p. 232):

> The debts of the community during its existence are the debts of the husband. * * *
>
> Upon the dissolution of the community by the death of the wife, the responsibility of the husband in regard to the community

debts is not changed. He is absolutely and personally bound for their payment; and his separate property may be seized and sold for their acquittal.

The only apparent limitation upon the husband's liability for community debts is that community creditors must proceed first against the community estate before proceeding against the separate estate of the husband. Article 2403 of the Revised Civil Code, *infra; Succession of Lamm*, 40 La. Ann. 312, 315.

There is no conflict between the husband's liability for debts of the community and the doctrine of reimbursement. It is only when he voluntarily enriches the community property at his own expense that he may receive reimbursement and the reimbursement is not for the amount actually expended but for the increase in the value of the community property. *Dillon* v. *Freville, supra; Munchow* v. *Munchow, supra.*

(D)

THE WIFE HAS NO POWER TO MAKE CONTRACTS OR ASSUME OBLIGATIONS RELATING TO THE COMMUNITY PROPERTY NOR TO SUE OR BE SUED WITH RESPECT TO COMMUNITY CLAIMS

Article 121–132 of the Revised Civil Code, *infra.*

Articles 106, 107 and 118 of the Code of Practice, *infra.*

Act 132 of 1926, *infra.*

National City Bank v. *Barringer*, 143 La. 14.

Succession of James, 147 La. 944.

By amendments to the Civil Code and the Code of Practice in 1916, and subsequent years, the wife now has the power to make contracts and to sue and be sued with reference to her separate estate. See Act 132 of 1926, *infra*. This Act specifically provides that it shall not be construed as affecting in any way the matrimonial community of acquets and gains. It has accordingly been held that it did not have any effect on the wife's inability to contract with reference to community property. *Hellberg* v. *Hyland*, 168 La. 493. See *Lorio* v. *Gladney*, 147 La. 930.

There is no other statute giving the wife authority to enter into contracts relating to community property and the Supreme Court of Louisiana has repeatedly held that she has no such power. *Succession of James, supra; National City Bank* v. *Barringer*, 143 La. 14. The general rule is that she cannot contract any debts which will bind the community without her husband's consent. See Articles 121 to 132 of the Revised Civil Code, *infra*; *Gosserand* v. *Monteleone* 164 La. 398, *Fabacher* v. *Rouprich*, 160 La. 433.

In *Hellberg* v. *Hyland*, 168 La. 493, the wife had inherited certain money (her separate property) which she used in making speculations in real estate. In a suit by her to enforce specific performance of a contract for the sale of real estate, the Supreme Court of Louisiana held that the profits derived from that source were community property and that she had no right to use them in the

purchase of real estate without her husband's consent, nor to sue for the enforcement of a contract to sell. In *Mitchell* v. *Dixie Ice Co., supra,* it was held that the wife could not sue for damages to community property even with her husband's consent in view of the provisions of Article 107 of the Code of Practice, *infra.* See also Articles 106 and 118 of the Code of Practice, *infra,* and Act 132 of 1926, *infra.*

It is of interest that damages for personal injuries to the wife constitute her separate property and that she alone may sue for them. Article 2402, *infra.*

An exception which is not made in the statute but has been established through judicial decisions is that when the wife sues the husband for a separation from bed and board the fees of her attorney constitute a charge against the community. *Gosserand* v. *Monteleone, supra.*

The Louisiana Civil Code does not contain any express provision which makes the wife the manager of the community upon abandonment by her husband similar to provisions found in the laws of other community property States. See, however, Articles 57 and 64, *infra.* A limited right to contract for necessities is given to the wife in cases where the husband has failed or refused to furnish them, but it is the husband rather than the community that is made liable. Section 120 of the Revised Civil Code, *infra; Schaeffer* v. *Trascher,* 165 La. 315.

(E)

THE WIFE IS NOT PERSONALLY LIABLE FOR DEBTS OF THE COMMUNITY DURING ITS EXISTENCE AND UPON ITS DISSOLUTION SHE MAY AVOID BECOMING LIABLE FOR ANY PART OF THEM

Articles 126, 127, 128, 2410 of Revised Civil Code, *infra.*
Act 4 of 1882, *infra.*
Act 132 of 1926, *infra.*
Kelly v. *Robertson, supra.*
Successions of M. S. & P. Cason, supra.

In *Ring* v. *Schilkoffsky,* 158 La. 361, it was held that where property upon the security of which the husband and wife executed a joint note and mortgage was community property the debt was a community debt for which the wife could in no way be bound. She can not be made liable for the payment of any community debt so long as the community exists. *Kelly* v. *Robertson, supra; Successions of M. S. & P. Cason, supra.*

Upon the dissolution of the community by death, by divorce, or by separation from bed and board the wife may become personally liable for one-half of the community debts under Article 2409, *infra,* or she may avoid personal liability for the debts of the community in either of two ways. She may renounce the community entirely, in which case she does not become liable for any of the community debts and does not receive any of the community property but retakes all of her separate effects whether dotal or extra-dotal. Articles 2410–2423,

infra; Act 4 of 1882, *infra;* Article 2430, *infra.* She may not renounce, however, if she has taken an active part in the concerns of the community. Article 2412, *infra.* On the other hand she may accept the community property "under the benefit of inventory, in the same manner and with the same benefits and advantages as heirs are allowed by existing laws to accept a succession under the benefit of inventory." Act 4, of 1882, *infra; Phillips* v. *Phillips,* 160 La. 813, *supra.* The language quoted from the Act of 1882 means that the widow may have an inventory made of the community estate and take one-half of the net amount remaining after the payment of all community debts. *Phillips* v. *Phillips, supra; Schreiber* v. *Beer's Widow and Heirs,* 150 La. 676. Obviously, by this means also the widow has it within her power to avoid becoming personally liable for any of the community debts.

In the case at bar it appears that the wife at the husband's instance and with his approval reported one-half of the community income and that the tax on the income as reported was paid by the husband out of community funds.

(F)

WHILE UNDER CERTAIN CIRCUMSTANCES THE WIFE MAY BRING THE COMMUNITY TO AN END AND SECURE A DIVISION OF COMMUNITY PROPERTY, SHE CAN NOT DURING THE EXISTENCE OF THE COMMUNITY SUBSTITUTE HER MANAGEMENT FOR THAT OF THE HUSBAND OR DEMAND ANY PART OF THE COMMUNITY INCOME FOR HER OWN USE

Articles 123, 150, 155, 160, 2408, 2410, 2425, 2430, 2446, Revised Civil Code, *infra.*
Article 105 of Code of Practice, *infra.*
Gastauer v. *Gastauer,* 131 La. 1.
Viguerie v. *Viguerie,* 133 La. 406.

The effect of a separation from bed and board or a divorce is that it brings the community of acquets and gains to an end. Articles 123, 150, 155, 156, *infra.* In *Giglio* v. *Giglio,* 159 La. 46, it was held that when a divorce decree becomes final the husband and wife become co-owners with equal undivided interests in the community property and either of them has the right to provoke a judicial partition.

In the partition of property upon separation from bed and board or upon divorce, the wife will have restored to her one-half of the community property and will be subject to the payment of one-half of the community debts providing she does not renounce the community or accept it under benefit of inventory with the result, previously mentioned, of receiving only one-half of the residue of the community property remaining after the payment of

debts. As previously pointed out, the court has no discretion in the division of property between the two spouses. If there is a division, it must be equal except for the necessity of taking into consideration the principle of enrichment discussed heretofore. Article 2408, *infra.*

Independently of an action for divorce or of separation from bed and board, the wife may, under Article 2425, *infra,* petition for a separation of property where her dowry is in danger owing to her husband's mismanagement or otherwise or "when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims."

While this provision does not in terms relate to a case where the husband is mismanaging the community funds, the Supreme Court of Louisiana has evidently considered that the provision should be liberally construed and that even in the absence of separate property the wife may secure relief whenever the husband's mismanagement puts her present or eventual rights in peril. *Gastauer* v. *Gastauer,* 131 La. 1, 7; *Jones* v. *Jones,* 119 La. 677.

The effect of the separation of property, however, is to terminate the community of acquets and gains as permanently as if there were a divorce. *Snoddy* v. *Brashear,* 13 La. Ann. 469. It does not substitute her management over the community property for that of her husband. It ends the community, and, if she does not renounce the com-

munity, puts into her control as her separate property her share of the then existing community estate.

Nor is there any other more immediate remedy afforded the wife in the event that her husband mismanages the community property. It is true that she may obtain an injunction to restrain him from disposing of the community property pending an action for separation of property, separation from bed and board or divorce. Article 298 of the Code of Practice, *infra.* See also Article 150 of the Revised Civil Code, *infra.* This protection is limited and is anticipatory of the dissolution of the community.

Section 2404 of the Revised Civil Code, *infra,* also prohibits the husband from disposing of the community property with intent to defraud the wife, but she has no present remedy against him in such cases. The statute merely gives her the right to recover the value of the alienated property upon his death. Article 2404, *infra;* See *Dixon* v. *Dixon's Ex.,* 4 La. 188. In *Smallwood* v. *Pratt,* 3 Robinson 132, it is suggested that upon separation from bed and board the wife would have a remedy against the husband during his lifetime for his fraudulent disposition. In either case it is *only upon the dissolution of the community* that the wife can maintain an action against him or his heirs.

There is no statutory action by which the wife during the existence of the community may sue her

husband to recover her share of the community property without putting an end to the community. There is no procedure by which she may compel him to pay over to her a portion of the community income as it is earned or assume the management of her half of the community property. The wife's power to sue her husband is a limited one in Louisiana and it can not be enlarged beyond the statute. Article 105 of the Code of Practice, *infra; Viguerie* v. *Viguerie, supra.*

We submit that the restraints which the wife may place upon her husband's disposition of community funds may be exercised only with a view to the dissolution of the community and that she does not have a right to interfere actively with her husband's control and enjoyment of the community property and income during its existence. While the fact that she may sue him for a separation of property may to a limited extent act as a curb upon the husband, it does not in fact constitute a present and immediate interference.

(G)

SUMMARY

We submit that, under the Louisiana statutes and decisions, during the existence of the community the husband has the exclusive right to manage the community property and the income therefrom and to dispose of the same, subject only to a

limitation as to gifts and as to alienation of community property with intent to defraud his wife.

The husband is more closely identified with the community than the wife, for the community property may be reached for the payment of his separate debts and he and his separate property are at all times liable for the payment of the community debts. On the other hand, the community property is not liable for the payment of the separate debts of the wife; she has no liability for the community debts during the existence of the community and may avoid liability after its dissolution.

The wife has no positive powers of dominion over the community property and income during the existence of the community. Her only recourse against the husband's mismanagement is to bring the community to an end through securing a divorce, a separation from bed and board or a separation of property. Nor does she have a remedy against his fraud until the dissolution of the community.

The wife's power to bring the community to an end is not a present right to control and enjoy the community income, the taxation of which is involved in this case. We submit that the wife's so-called vested interest in the community property is no more than the right, if she so elects, to receive upon the dissolution of the community one-half of the then existing community property subject to

adjustments for enrichment and fraudulent or invalid alienations of the husband or to have her interest pass to her heirs or devisee. She cannot transfer by will or claim in separation a half interest in any particular thing but only a half interest in the property existing at the termination of the community, subject to the payment of debts.

But as we pointed out in our brief in the case of *Poe* v. *Seaborn, supra,* the case is not to be decided according to the extent of the negative control of the wife over the community property, or her technical present interest in it, or the ultimate rights that may vest upon dissolution of the community. Neither the corpus of the community property nor the rights of the respective spouses are the subject of the tax. The tax is based on the current receipt of income and, if it is to produce "practical results," it must be imposed upon him who has the right to receive and dispose of the income. In the State of Louisiana that person is the husband, however the community fund may upon dissolution be affected by the interest of the wife.

The attention of the Court is directed to the case of *Zemurray* v. *United States,* 64 C. Cls. 657, certiorari denied, 278 U. S. 600. In that case, which involved Louisiana community income for 1917 and 1918, the Court of Claims held that under the Louisiana law community income was under the complete control of the husband, and that, therefore, under the *Robbins case,* the entire community income was properly taxed to the husband.

CONCLUSION

The decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted.

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SEPTEMBER, 1930.

APPENDIX

UNITED STATES STATUTES

The Revenue Act of 1926, c. 27, 44 Stat. 9, 21–22, 37, 130, provides in part as follows:

> SEC. 210. (a) In lieu of the tax imposed by section 210 of the Revenue Act of 1924, there shall be levied, collected, and paid for each taxable year upon the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, except that in the case of a citizen or resident of the United States the rate upon the first $4,000 of such excess amount shall be 1½ per centum, and upon the next $4,000 of such excess amount shall be 3 per centum; * * *. (U. S. C. App., Title 26, Sec. 951.)
>
> SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows: * * *. (U. S. C. App., Title 26, Sec. 952.)
>
> SEC. 223. (a) The following individuals shall each make under oath a return stating specifically the items of his gross income and

the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) If a husband and wife living together have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

(c) If the taxpayer is unable to make his own return, the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. (U. S. C., App., Title 26, Sec. 964.)

SEC. 1212. Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the State law applicable to such marital community for such period.

Any spouse who elected so to return such income shall not be entitled to any credit or refund on the ground that such income should have been returned by the other spouse. (U. S. C. App., Title 26, Sec. 964 a.)

LOUISIANA STATUTES

Louisiana Revised Civil Code, 1870:

ART. 57. When a person shall not have appeared at the place of his domicile or habitual residence, and when such person shall not have been heard of, for five years, his presumptive heirs, may, by producing proof of the fact, cause themselves to be put by the competent judge into provisional possession of the estate which belonged to the absentee at the time of his departure, or at the time he was heard of last, on condition of their giving security for their administration.

ART. 64. The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife.

If on the contrary the husband or wife of the absentee chooses rather to have the

community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards.

ART. 120. The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

ART. 121. The wife can not appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband.

ART. 122. The wife, even when she is separate in estate from her husband, can not alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing.

ART. 123. The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains.

ART. 124. If the husband refuses to empower his wife to appear in court, the judge may give such authority.

ART. 125. If the husband refuses to empower his wife to contract, the wife may cause him to be cited to appear before the judge, who may authorize her to make such contract, or refuse to empower her, after the husband has been heard, or has made default.

ART. 126. A married women over the age of twenty-one years, may, by and with the authorization of her husband, and with the sanction of the judge, borrow money or contract debts for her separate benefit and advantage, and to secure the same grant mortgages or other securities affecting her separate estate, paraphernal or dotal.

ART. 127. In carrying out the power to borrow money or contract debts, the wife, in order to bind herself or her paraphernal or dotal property, must, according to the amount involved, be examined, at chambers by the judge of the district or parish in which she resides, separate and apart from her husband, touching the objects for which the money is to be borrowed or debt contracted, and if he shall ascertain either the one or the other are for her husband's debts or for his separate benefit or advantage, or for the benefit of his separate estate, or of the community, the said judge shall not give his sanction authorizing the wife to perform the acts or incur the liabilities set forth in article 126.

ART. 128. If the wife shall satisfy the judge that the money about to be borrowed

or debt contracted is solely for her separate advantage, or for the benefit of her paraphernal or dotal property, then the judge shall furnish her with a certificate setting forth his having made such examination of the wife as is required by article 127, which certificate, on presentation to a notary, shall be his authority for drawing an act of mortgage, or other act which may be required for the security of the debt contracted, and shall be annexed to the act, which act, when executed as herein prescribed, shall furnish full proof against her and her heirs, and be as binding in law and equity in all courts of this State, and have the same effect as if made by a *femme sole*.

ART. 131. If the wife is a public merchant, she may, without being empowered by her husband, obligate herself in any thing relating to her trade; and in such case, her husband is bound also, if there exists a community of property between them.

She is considered as a public merchant, if she carries on a separate trade, but not if she retails only the merchandise belonging to the commerce carried on by her husband.

ART. 132. If the husband is under interdiction or absent, the judge may, when satisfied of the fact, authorize the wife to sue or be sued, or to make contracts.

ART. 149. During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisement to be made for the movables and im-

movables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner.

ART. 150. From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

ART. 155. Separation from bed and board carries with it separation of goods and effects.

ART. 156. In case of separation from bed and board, the party against whom it shall have been pronounced, shall lose all the advantages or donations, the other party may have conferred by the marriage contract or since, and the party at whose instance the separation has been obtained, shall preserve all those to which such party would have been entitled; and these dispositions are to take place even in case the advantages and donations were reciprocally made.

ART. 159. The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

ART. 160 (as amended).[1] If the wife who has obtained the divorce, has not sufficient means for her maintenance, the court may allow her, in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income.

This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage.

ART. 915 (as amended).[2] When either husband or wife shall die, leaving neither a father nor mother, nor descendants, and without having disposed by last will and testament, of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which will go to the father and mother, or the survivor of them, and the other portion shall go to the surviving spouse.

ART. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament,

[1] Amended by Act 247, Acts of Louisiana, 1916, p. 521.

[2] Amended Act 160 of Acts of Louisiana, 1920, pp. 250–251.

of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

ART. 917. When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed.

ART. 2332. The partnership, or community of aquets or gains, needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334 (as amended).[3] The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living separate and apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade,

[3] Amended Act 186 of Acts of Louisiana, 1920, pp. 304–305.

occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses, and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife by reason of fault on her part, sufficient for separation or divorce shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent.

ART. 2383. All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of marriage, is paraphernal.

ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of his property, whether natural, civil, or the result of labor, belong to the conjugal partnership, if there exist a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hand; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the thing which produced them.

ART. 2392. Married persons may stipulate that there shall be no partnership between them.

ART. 2393. In this case, the wife preserves the entire administration of her movable and immovable property, and the free enjoyment of her revenues.

ART. 2394. She may alienate her movable and immovable property, in the manner and in the cases above provided for with respect to paraphernal property.

ART. 2395. Each of the married persons separate in property, contributes to the expenses of the marriage in the manner agreed on by their contract; if there be no agreement on the subject, the wife contributes to the amount of one-half of her income.

ART. 2396. When the wife, who is separate in property, has left the enjoyment of her property to her husband without any procuration, he is not answerable for the fruits, until a demand of them be made by his wife, or if it is not made, until the dissolution of the marriage. He is not accountable for the fruits which have been previously consumed.

ART. 2397. The wife, whether separated in property by contract or judgment, or not separated, cannot, except by and with the authorization of the husband, and in default of the husband, with that of the judge, alienate her immovable effects of whatever nature they may be, except in cases where the alienation of the dotal immovable is permitted.

ART. 2398. The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage.

ART. 2399. Every marriage contracted in this State, superinduces of right partnership **or community of acquets or gains, if there** be no stipulation to the contrary.

ART. 2400. All property acquired in this State by non-resident married persons, whether the title thereto be in the name of either the husband or wife, or in their joint names, shall be subject to the same provisions of law which regulate the community of acquets and gains between citizens of this State.

ART. 2401. A marriage, contracted out of this State, between persons who afterwards come here to live, is also subjected to community of acquets, with respect to such property as is acquired after their arrival.

ART. 2402 (as amended).[4] This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even

[4] As amended by Act 68, Acts of Louisiana, 1902, p. 95.

although the purchase be only in the name of one of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws."

ART. 2403. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

ART. 2404.[5] The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyances *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the mar-

[5] As amended by Act 96, Acts of Louisiana, Reg. Sess., 1926, p. 136.

riage. A gratuitious title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one half of the property, on her satisfactorily proving the fraud.

ART. 2405. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

ART. 2406. The effects which compose the partnership or community of gains, are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the

other, or even although one of the two did not bring anything at all.

ART. 2407. The fruits hanging by the roots on the lands belonging separately to either the husband or the wife, at the time of the dissolution of the marriage, are equally divided between the husband and the wife or their heirs. It is the same with respect to the young of cattle yet in gestation.

The fruits of the paraphernal effects of which the wife reserved to herself the enjoyment, are excepted from the rule contained in this article.

ART. 2408. When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase of ameliorations be the result of the common labor, expenses, or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

ART. 2409. It is understood that, in the partition of the effects of the partnerhip or community of gains, both husband and wife are to be equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution.

ART. 2410 (as amended).[6] Both the wife and her heirs or assigns have the privilege

[6] See Act 4 of 1882, *infra* p. 68.

of being able to exonerate themselves from the debts contracted during the marriage, by renouncing the partnership of community of gains.

ART. 2411. The wife, who renounces, loses every sort of right to the effects of the partnership or community of gains.

But she takes back all her effects, whether dotal or extradotal.

ART. 2412. The wife who has taken an active concern in the effects of the community, cannot renounce the same.

Acts which are simply administrative or conservatory, do not come, in this article, under the denomination of active concern.

ART. 2413. The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.

ART. 2414. She ought also to make her renunciation within the same delays which are allowed for the beneficiary heir to explain his intentions.

After the expiration of these delays, she may be, in the same manner, forced to make her decision, and judgment may be rendered against her as a partner, unless she renounces.

ART. 2417. The widow, above the age of majority, who has allowed a judgment to pass against her as a partner, by a court of general jurisdiction, shall lose the power of renouncing.

ART. 2418. The widow who has concealed or made away with any of the effects of the partnership or community of gains, is declared to be a partner in community, notwithstanding her renunciation. It is the same with respect to her heirs.

ART. 2420.[7] The wife, separated from bed and board, who has not within the delays above fixed, to begin from the separation finally pronounced, accepted the community, is supposed to have renounced the same; unless, being still within the term, she has obtained a prolongation from the judge, after the husband was heard or after he was duly summoned.

ART. 2421. The creditors of the wife may attack the renunciation, which may have been made by her or by her heirs with a view to defraud her creditors, and accept the community of gains in their own names.

ART. 2422. The widow, whether she accept or renounce, has a right, during the delays which are granted to her to make an inventory and deliberate, to receive her maintenance and that of her servants out of the provisions in store; and if there be none, she has a right to borrow on account of the common stock, on the condition, however, of using the privilege with moderation.

She owes no rent for the residence she may have made, during such term, in a house appertaining to the community or belonging to

[7] Repealed by Act No. 49, Acts of Louisiana, Reg. Sess., 1926, p. 63.

the heirs of the husband; and if the house, which both husband and wife did inhabit at the time of the dissolution of the marriage, was rented by them, the wife shall not contribute, during the same term, to the payment of the rent, which shall be taken out of what belongs to the whole.

ART. 2423. In case of the dissolution of the marriage by the death of the wife, her heirs may renounce the partnership or community of gains, within the term and according to the forms which the law prescribes to the surviving wife.

ART. 2424. Married persons may, by their marriage, contract, modify the legal community, as they think fit, either by agreeing that the portions shall be unequal, or by specifying the property, belonging to either of them, of which the fruits shall not enter into the partnership.

ART. 2425. The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to a mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

ART. 2430. The wife, who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

Louisiana Code of Practice, 1870:

ART. 105. A married woman can not sue her husband as long as the marriage continues, except it be to obtain a separation from bed and board, or for the separation of property, or for the restitution and enjoyment of her paraphernal property, or in case she holds her property separate from him by her marriage contract, or for divorce; but in no case can she sue her husband without the authorization of the court before which she brings her action.

ART. 106.[8] A married woman, whether she be of age or a minor, can not appear in court against any one without the authorization of her husband, although she may be a public merchant, carrying on her trade separate from him, unless she has obtained a separation from bed and board by virtue of a judgment duly executed, or has been regularly divorced.

ART. 107. Husbands have under their control the personal and possessory actions to which their wives are entitled, though they be themselves minors; therefore they can proceed judicially, and in their own name, in whatever relates to the preservation of the dotal property which their wives have

[8] Repealed in 1926 and replaced by Act 132 of 1926, *infra*, p. 68.

brought to them by marriage, as well as to the recovering of the debts due them, these being under their administration.

But actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge if he fails to do it.

ART. 118.[9] When one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband.

Should her husband be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought to defend it alone.

Nevertheless, if she be divorced or separated from her husband, from bed and board, by a judgment duly executed, she may be sued alone without the authorization of her husband or of the judge being required.

ART. 298. The injunction must be granted, and directed against the defendant himself, in the following cases:

* * * * *

6. When a woman has sued her husband for a separation of property, or for a separation from bed and board, and fears that he will, during the pendency of the suit, dispose, to her prejudice, of the property either held in the community or on which she has a privilege for her dotal rights.

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[9] Repealed in 1926 and replaced by Act 132 of 1926, *infra*.

* * * * *

Act 4, Acts of Louisiana, 1882, pp. 5–6:

(Title Omitted)

Be it enacted by the General Assembly of the State of Louisiana, That at the dissolution for any cause of marriage community, it shall be lawful for the wife to accept the community of acquets and gains under the benefit of inventory, in the same manner and with the same benefits and advantages as heirs are allowed by existing laws to accept a succession under benefit of inventory.

Act 102, Acts of Louisiana, 1916, p. 223:

(Title Omitted)

* * * * *

SECTION 9. Be it further enacted, etc., That no assignment of or order for wages or salaries to be earned in the future shall be valid when made by married men, unless the written consent of his wife to the making of such assignment or order is attached thereto; provided, that where a married man is living separate and apart from his wife for a period of five months prior to such assignment or the giving of such order, then such consent shall not be required.

Act 132, Acts of Louisiana, Reg. Sess., 1926, pp. 207–208:

(Title Omitted)

SECTION 1. Be it enacted by the Legislature of Louisiana, That a married woman,

whether a resident of this State or not, shall be competent to contract debts, purchase, sell and mortgage and to bind and obligate herself personally and with reference to her separate and paraphernal property; to appear in court and to sue and be sued; to sell, alienate or otherwise dispose and to mortgage and pledge or otherwise encumber her separate and paraphernal property for the benefit of herself, her husband or any other person, and to bind and obligate herself personally or as surety for her husband or any other person.

SECTION 2. That such married women shall exercise the rights granted by Section 1, hereof, without the necessity of obtaining the authority of her husband or the judge.

SECTION 3. That the rights hereby granted shall not apply to married women under the age of eighteen years or to married women who are interdicted.

SECTION 4. That nothing herein contained shall be deemed or construed to affect in any way the statutes of this State establishing and regulating the matrimonial community of acquets and gains, and prescribing what shall be deemed separate property of the spouses.

SECTION 5. That all laws or parts of laws in conflict herewith, be and the same are hereby repealed.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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CHARLES ELMORE C

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, Petitioner,

Versus

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

CHARLES E. DUNBAR, JR.,
MONTE M. LEMANN,
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BRADY & PFAFF LTD., NEW ORLEANS

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE, Petitioner,

Versus

WILLIAM PFAFF

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The decision of the District Court is reported in 38 F. (2nd) 642. The opinion of the Circuit Court of Appeals, affirming the decision of the District Court, is reported in 38 F. (2nd) 649.

JURISDICTION

The case comes to this Court upon the petition for certiorari filed by the United States granted May 26, 1930, (R. 35). Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE

The brief for the United States, petitioner, contains an accurate statement of the facts, which were stipulated below. (R. 9-15).

Special attention may be called to the fact that the returns made by the husband and the wife in the present case, dividing the community income between them, were made in accordance with the rulings of the Treasury Department then on file and in effect (R. 11). These rulings had been in force for a number of years and were based upon an opinion rendered by the Attorney-General in 1921.

QUESTION INVOLVED

The question involved is whether the income accruing in Louisiana to a husband and wife domiciled in that State and forming their community income under its laws may be entirely taxed to the husband or whether he may be taxed only for half thereof, leaving the other half to be taxed to the wife.

SUMMARY OF ARGUMENT

The Federal Revenue Acts tax each individual only on the income belonging to him or her. The language of the Revenue Act of 1926, as well as the similar language contained in previous Revenue Acts, clearly authorizes husband and wife to each report his or her income in a separate return.

What is property or income in any particular case for the purpose of applying the Federal Revenue Law is determined by the law of the state in which the owners are domiciled and the income accrues. Under the law of Louisiana, the wife has an equal one-half ownership in community partnership income.

There is nothing in the language of the Revenue Act of 1926, or prior acts, (except the provision taxing the donor of a revocable trust hereinafter referred to) expressly or impliedly indicating an attempt on the part of Congress to tax an individual, or husband, on income admittedly belonging to another person on the theory of the dominion and control over such income exercised by the individual, or husband, sought to be taxed. By the lan-

guage of the Revenue Act, it is the net income "of" an individual which is taxed, and not the net income "controlled by" an individual. Since 1920, the Treasury Department and the Attorney General, in carefully prepared opinions, have ruled that the Revenue Act of 1918, which employed the same language as the Act of 1926, intended to tax husbands and wives in community property states on the income of each as determined by state law and that the wife in Louisiana and other community property states, *except California,* is the owner of one-half of the community property income and entitled to report it separately as her income. Furthermore, Congress has twice, once in 1921 and again in 1924, rejected amendments to the Revenue Act, which would have expressly taxed "community income" to the spouse having the "management and control" of the community property. The amendments were presented by the Treasury Department and were designed to bring about the result which the Government is now contending can be inferred from the Act without such amendments. The long continued prior executive construction of the previous Revenue Acts containing similar language, the rejection of the two amendments referred to and the passage of the Act of 1926 in the light of this executive and legislative history amounted to an adoption of the previous construction of the executive department. Under repeated decisions of this Court the re-enactment by Congress, without change, of a statute which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States vs. G. Falk & Bro.,* 204 U. S. 143; *United States vs. Hermanos,* 209 U. S. 337, 339; *National Lead Co. vs. United States,* 252 U. S. 140. This rule is applicable *a fortiori* here because Congress not merely reenacted the Revenue Act three times without change, in the light of and with the actual knowledge of the existing executive and legal construction, but explicitly twice voted down amendments designed to change such construction. The

Government's position with reference to statutory construction is therefore inconsistent both with the plain meaning of the Revenue Act, and with its executive and legislative history.

The real issue in this case is whether half of the community income belongs to the wife under the law of Louisiana, which is the test adopted by Attorney General Mitchell in his opinion suggesting these test cases (35 Op. Atty. Gen. 265).

The Government in its brief suggests that the taxation of Trustees in the Revenue Acts supports its theory that Congress intended to tax income to the individual having the enjoyment and control thereof. But a Trustee is merely required, under certain circumstances, to make a separate return for the trust estate under his administration, and in such cases the Trustee pays the tax out of the trust estate and in its behalf. The return by the Trustee for the trust estate is always separate from that which the individual who is Trustee makes of his personal income. Congress has not attempted to make X, Trustee, add to his personal income the income which he manages for Y *cestui* and pay an income tax on the combined total. The Government, however, is contending in this case that the husband must include in his individual and personal income tax return the community income of the wife which is under his management as managing partner or Trustee. If the husband in Louisiana were to be analogized to a Trustee, he would not make a single return of his income combined with the community partnership income, as the Government contends, but he would make two returns, one as an individual covering his separate income and one as Trustee covering the community income.

The marital partnership is more analogous to ordinary partnerships than to any other legal relationship and the Revenue Act does not tax the managing partner or re-

quire him to combine the partnership income with his individual income, but, on the contrary, expressly permits each partner to report in his individual return his share of the partnership income, which is the procedure adopted by Mr. Pfaff, the plaintiff in this case, and his wife.

Even if Congress could be said to have indicated an intent to tax individuals upon the basis not of ownership of income but of "management and control" or "enjoyment" or "unfettered command" the Louisiana husband cannot be taxed upon the entire community income because he has not unfettered command or control or enjoyment thereof under the Louisiana law.

The decision of this Court in *United States vs. Robbins*, 269 U. S. 315, is not decisive of this case because:

(a) That case arose in California and the decision was based primarily upon the fact that under the local decisions in California, the wife has no vested interest and ownership in the community income but merely an expectancy depending upon whether she survives her husband. In Louisiana, the wife has a vested interest and ownership in community income from the moment that the income comes into being. In short, the wife in California is not the owner of one-half the community income. In Louisiana she is.

(b) The statement by this Court in the *Robbins* case that even if the wife in California had an interest in community income, Congress not only had the power, but had shown an intent by the Revenue Act, to tax the entire community income to the husband because he had the disposition of the fund, was made by the Court without reference to the contrary construction consistently placed upon the Revenue Act by the Treasury Department upon the advice of the Attorney General and without reference to the approval of that construction by Congress which twice expressly **rejected** proposed amendments which would have specifically taxed all community income to the spouse "hav-

ing the management and control of community property." In the *Robbins* case the Government itself had limited its contentions to the point that the California wife had no real ownership but only "an expectancy," and the question as to whether the Revenue Act could be construed as imposing a tax upon any basis other than ownership had not been put in issue by any of the parties, so that no occasion existed to emphasize to the Court the legislative and departmental history which conclusively shows that Congress in dealing with the community property problem (unlike its position in dealing with revocable trusts, see *Corliss vs. Bowers,* 281 U. S. 376) had expressly refused to adopt control, as distinguished from ownership, as a basis for taxation.

(c) Even if notwithstanding its departmental and legislative history, the Revenue Act could be construed as taxing the husband upon the entire community income in every State where he alone could dispose of the fund and exercise "exclusive rights" of "management" and "enjoyment" over it, the husband in Louisiana could not be so taxed because, *unlike the husband in California dealt with in the Robbins case,* he does not under the Louisiana law exercise *exclusive* rights of *"disposition"* and *"enjoyment",* his powers being subject to various substantial checks and limitations corresponding to those imposed upon any managing partner or agent and his wife being entitled to assert those limitations. By statute the husband is expressly prohibited from donating community real estate or the whole or a quota of the movables. He may not use any portion of the community income to improve his separate estate or pay his separate debts. He may not dispose of the community income in any manner by fraud to injure his wife. The wife may, without obtaining a divorce, and even in the absence of fraud, sue for a dissolution and liquidation of the community partnership and secure the delivery into her own exclusive management and control of her

share of the community property whenever the husband proves *incompetent, a bad manager, reckless or of a speculative disposition, or whenever his affairs are in such disorder as to jeopardize her property rights,* and upon such a suit the wife may obtain an injunction restraining the husband entirely from any disposition of community property. Even if the husband is a good business manager, if he is otherwise an unfaithful partner, the wife may upon a divorce proceeding provoke a dissolution and liquidation of the community partnership and upon filing such a proceeding may enjoin the husband from any disposition whatsoever of the community partnership property. In the event of a divorce, the wife is entitled absolutely and of right to an exact one-half of the community property. The court has no discretion or power to award her less. Even if it is the husband who obtains the divorce and the wife has been guilty of the most serious misconduct, as for instance, adultery, the community partnership is immediately liquidated and the wife is bound to receive one-half of the community property. The wife may will her half of the property to whomsoever she pleases, even to her paramour or concubine, and the husband has no right to complain. If the wife makes no will, her children take her share of the community property to the exclusion of the husband; this will be so although the children are the wife's illegitimate children by another man. If the wife should will to the husband one-half of the community property, he takes by inheritance and the State of Louisiana exacts from him a tax thereon and the United States itself assesses an estate tax upon the amount so inherited even though it comprises solely the wife's interest in the earnings which the husband has made during marriage by the practice of his profession or the exercise of any other form of effort.

Not one of these limitations upon the husband (except for a restriction in the matter of gifts) existed in the *Robbins* case nor does the California wife enjoy any of the

rights of the Louisiana wife set out in the foregoing summary.

Garrozi vs. Dastas, 204 U. S. 64, cited in the *Robbins* case and also referred to in the Government's brief in this case as authority for the proposition that if the husband wastes community property in debauchery, the wife has no redress, arose under the law of Porto Rico and would not be followed in Louisiana. This was expressly held by Judge Dawkins in his opinion in the District Court in the present case (R. 24-5). The law of Porto Rico, which was involved in the *Garrozi* case was based entirely upon the law of Spain. The law of Louisiana is conceded by the Government to have unique features (Government's brief, page 25). While deriving some of its provisions from the Spanish law (since Louisiana was under Spanish rule in the latter part of the 18th Century), the law of Louisiana is chiefly modeled upon the Code Napoleon, more than half of the articles of the Louisiana Code on the subject of community property being literally copied from the Code Napoleon. This Court itself in the *Garrozi* case recognized that the powers of the husband are less extensive under the Code Napoleon and the law of the countries which have followed that Code than under the Spanish system.

The decision of this Court in *Corliss vs. Bowers,* 281 U. S. 376, does not support the construction of the Revenue Act or the basis of taxation urged by the Government in this case because:

(a) The only question involved in the *Corliss* case was the constitutionality of a particular amendment to the Revenue Act of 1926. The amendment in question *expressly* provided that the grantor of a revocable trust should be taxed upon the income therefrom. The intent of Congress was clearly expressed in making this exception to the general rule of the income tax law, which taxes individuals on the basis of ownership. The only question involved was whether the amendment expressly establishing this

exception to the general rule was constitutional. In the present case, not only is there no express provision in the Revenue Act taxing community income to the husband because of his control, but on the contrary, the Act, as construed and interpreted by the Treasury Department and the Attorney-General, permits husbands and wives to make separate returns including in their returns the income of each, as determined by local state law and Congress has expressly indicated its approval of such construction by the re-enactment of the Revenue law in the light of this long executive construction and by twice expressly rejecting amendments designed to establish a different rule and to tax the entire community income to the husband. In the present case, the Government is, therefore, seeking to have the Court impute to Congress an intention which it has explicitly repudiated.

(b) The reasoning in the *Corliss* case with reference to the constitutional question involved is inapplicable to the present case because the husband in Louisiana has not the "unfettered command" of the community income, but, on the contrary, he is analogous to a managing partner, trustee or agent and is subject in his administration of the community partnership property to all of the substantial limitations and restrictions and the wife is entitled to all the powers and rights previously described in this summary.

The fact that the husband may be held for community debts after community assets have been exhausted while the wife may restrict her liability to her share of the community assets, is not inconsistent with the spouses' equal ownership of the community property. The husband's liability is secondary and he is entitled to reimbursement by the community for any community debt which he pays out of personal assets. The statutes of various common law states authorize limited or special partnerships in which general partners having the management and control of the partnership property are personally liable if partnership assets are

insufficient to pay partnership debts, while at the same time the liability of the special partner, who has no part in the management or control of the partnership property, is limited to his or her share of the partnership assets. The positions of the husband and wife in the Louisiana community partnership correspond substantially to that of general and special partners, each of whom under the Revenue Act returns separately his share of the partnership income. Another analogy to our situation is found in the law of Spendthrift Trusts where the powers of the trustee are broad and the beneficiary has substantially no powers, the property owned by the beneficiary being not alienable by him or her and not subject to seizure for his or her debts. The trustee in a Spendthrift Trust files under the Revenue Act a separate return for the income of the trust estate, which is not taxed to him personally and not cumulated with the income belonging to him.

While it might be theoretically desirable that all Federal tax laws should produce identical results, this cannot happen so long as State law determines to whom income belongs. Attorney General Mitchell has himself expressly held in this very case that State law must control the question of ownership. (Opinion of July 16, 1927, 35 Op. Atty-Gen. 265). The Treasury Department is daily applying this rule in the application of the estate tax law. When State laws are given effect, differences in results under the Federal tax laws cannot be avoided. Thus, in some States, contractual or conventional partnerships between husband and wife to carry on a business are permitted and from these arrangements flow a division of income subject to the application of the Federal tax laws which could not be had by agreement in Louisiana where contracts between husband and wife are prohibited. So in many common law States property may be held under a contractual tenancy by the entirety which effects a division in income subject to the application of the Federal tax laws.

Such a contract or tenure is unknown in Louisiana. Unless we abrogate the well settled rule referring to State laws for determination of questions of ownership, identity of practical results in operation of the Federal tax laws cannot be attained.

As a matter of aggregate practical result, residents of Louisiana enjoy from the application to the community system of Federal tax laws no advantage over residents of other states. A lawyer who loses his wife in Louisiana pays estate and inheritance taxes upon one-half of his earnings accumulated since marriage (which belong to the community partnership) while a lawyer in Massachusetts pays no such taxes. The limitations upon the husbands in community states constitute practical disabilities and disadvantages, which outweigh any tax advantages. These are among the arguments which led Congress to reject proposed amendments of the Revenue laws, which were designed to provide the taxation of all community income to the spouse having the management and control thereof. Even upon a division of community income between husband and wife in Louisiana, they may pay greater aggregate Federal income taxes than a similarly situated husband and wife resident in Massachusetts as, for example, in the case where one of the spouses has separate income also

The fundamental and practical features of the Louisiana Community Partnership Law previously enumerated in this summary show clearly that the community partnership between husband and wife in Louisiana is not a fiction, but is in substance a partnership imposed by law, which creates burdens and limitations as well as privileges in relation to property rights of husbands and wives. These burdens and limitations on property rights are unknown in the common law States, and if it were true that any special benefit flowed from the community partnership in the way of separate income tax returns which the inhabitants of other States could not obtain by conven-

tional partnership agreements, such benefit would be more than counterbalanced by the multitude of legal burdens and restrictions placed upon the property rights of husbands and wives in the Louisiana marital partnership, which do not exist in the common law States (but the system establishing which those States would be free to adopt at any time if they cared to do so).

To take away from Louisiana and other community property States having similar laws the right of husband and wife to divide the community property for tax purposes, would in fact be a discrimination against such States and would not produce uniformity, but would deny a right developed from an ancient system of law, without giving the husband and wife the corresponding privileges and freedom with relation to property that common law partnerships and spouses enjoy. Absolute uniformity throughout the country in the Federal taxation of incomes of married persons could only be fairly obtained by having Congress make mandatory the taxation of the combined incomes of all husbands and wives everywhere as an entity; or, in other words, by requiring in every case the filing of a joint return, which under the present law, is optional. Such a provision would be uniform in operation throughout the country, and would remove the necessity for application of local state laws in determining property rights of married persons as between themselves.

But the controlling question involved in this case is one of law and not of politics or of practical advantage.

ARGUMENT

Our argument is divided into two parts. Part I deals with the Louisiana law as to ownership and control of community income with brief replies to the contentions of the Government with respect thereto and discussions of the *Corliss* and *Earl* cases. Part II reviews the construction and legislative history of the Federal Revenue Acts and discusses the *Robbins* case.

PART I.

A.

THE WIFE IN LOUISIANA IS OWNER OF ONE HALF OF COMMUNITY INCOME AND HAS A VESTED INTEREST THEREIN.

(1) The Civil Code of Louisiana Establishes a Marital Partnership Extending to All Acquisitions During Marriage and in Which the Wife is a One-Half Partner and Owner.

The more important articles of the Louisiana Civil Code dealing with the subject of community property are printed fully in an appendix hereto.

Article 2334 of the Louisiana Code provides that the property of married persons is divided into separate and common property; that separate property includes that acquired before marriage or by donation made to one of the spouses and also includes the wife's earnings and actions for damages when living apart from her husband or carrying on a separate business or trade; and then provides that:

> "Common property is that which is acquired by the husband and wife during marriage in any manner different from that above declared."

Article 2399 of the Louisiana Civil Code provides that:

> "Every marriage contracted in this State superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary."

Article 2402 of the Louisiana Civil Code provides that:

> "This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage,

> either by donations made jointly to them both, or by purchase, or in any other similar way * * *"

These provisions are in themselves sufficient to show that the husband is the owner of only half of the community property and that the remaining half belongs to the wife. As the term "partnership or community property" includes all property acquired during marriage, it must necessarily include all income accruing to the spouses after marriage.

The vested character of the wife's interest in such income under these codal provisions has been recognized by the decisions of the Supreme Court of Louisiana.

(2) The Decisions of the Supreme Court of Louisiana Recognize the Wife's Ownership of One-Half of All Community Income.

The latest general discussion is contained in *Phillips vs. Phillips,* 160 La. 813 (1926) where the Supreme Court of Louisiana said at page 825:

> "The wife's half interest in the community property is not a mere expectancy during the marriage; it is not transmitted to her by or in consequence of a dissolution of the community. The title for half of the community property is vested in the wife the moment it is acquired by the community or by the spouses jointly, even though it be acquired in the name of only one of them. Rev. Civ. Code, Art. 2420. The wife's half of the community property is liable, of course, for half of the community debts, just as the half interest of one of two joint owners of property is liable for half of the debts contracted by the other joint owner under a procuration to administer and dispose of the property for the mutual benefit of the joint adventure."

In this case, the court reviewed its earlier opinions, pointing out that *Guice vs. Lawrence,* 2 La. Ann 226 was not only inconsistent with earlier cases but had been in effect overruled by later decisions, citing *Succession of Marsal,* 118 La. 212 (1907); *Succession of May,* 120 La. 692 (1908); *Beck vs. Natalie Oil Co.,* 143 La. 154 (1918); *Lieb-*

man vs. Fontenot, 275 Fed. 688 (1921); *Warburton vs. White,* 176 U. S. 484 (1900), and *Arnett vs. Reade,* 220 U. S. 311 (1911).

Phillips vs. Phillips (cited with approval in *Conrad vs. Conrad,* 170 La. 312) is the last statement of the Supreme Court of Louisiana upon the subject, and it coincides with the first statement of that Court in *Dixon vs. Dixon's Executors,* 4 La. 188 (1832), decided by the famous Court of which Judges Porter, Martin, Matthews and Bullard were members, in which Judge Porter said:

> "The rights of husband and wife in the partnership of gains, grow out of the marriage contract, **and do not originate in its dissolution** and it is impossible to distinguish between the interest proceeding from such a contract, and that which springs from any other agreement the law sanctions * * *
>
> "The Napoleon Code does not contain the provision found in the Code of Louisiana, that if the husband alienates, during coverture, the acquets and gains, with the intention of injuring the wife, she may, at his decease, bring an action to set aside the alienation. The laws of Spain seem to have furnished that doctrine to the jurisconsults who prepared our Code. And the exercise of such a right, does appear to us utterly opposed to the principle, that the wife has no interest in the property, until the community is dissolved; for if she has not, how can she maintain an action to set aside the alienation? **Who ever heard of a suit, the sole basis of which was, that the hopes and expectations of the plaintiff had been disappointed and defeated by the acts of the defendant?"**

In *Theall vs. Theall,* 7 La. 226 (1834), plaintiff's husband completed his will with the following clause:

> "The rest of my property, both real and personal, I wish to be divided in the following manner: that is to say, one-half of all to my wife, the other half to my brother's children. * * *"

In a contest between the widow and the other heirs of the decedent, the latter contended that the widow took only half of the community property and was not entitled

also to half of the remaining half. The Court rejected this contention, saying:

> "A testator must be presumed to know, that his own property only can be the subject of his disposition, and that he cannot dispose of *the property of others.* * * *"

(3) The Wife's Vested Interest and Ownership in Half of the Community Income Has Been Recognized by This Court in Cases Approved by the Louisiana Supreme Court.

In the *Phillips* case, the Louisiana Supreme Court cited with approval the decisions of this Court in *Warburton vs. White,* 176 U. S. 484 (1900) and *Arnett vs. Reade,* 220 U. S. 311 (1900), showing that the language used by this Court in those cases would be equally applicable in Louisiana. In *Warburton vs. White,* Justice White said:

> "* * * **Property acquired during marriage with community funds became an acquet of the community and not the sole property of the one in whose name the property was bought,** although by the law existing at the time the husband was given the management, control and power of sale of such property. This right being vested in him not because he was the exclusive owner, but because by law he was created the **agent** of the community. The proceeds of the property when sold by him becoming an acquet of the community, subject to the trust which the statute imposed upon the husband, from the very nature of the property relation engendered by the provision for the community. * * *
>
> "* * * **It is a misconception of that system to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband. The conferring on the husband the legal agency to administer and dispose of the property involved no negation of the community, since the common ownership would attach to the result of the sale of the property."**

In *Arnett vs. Reade,* 220 U. S. 311 (1911), the Court through Justice Holmes said, after referring to the decision of the Supreme Court of New Mexico there under review:

> "The Supreme Court does not put its decision upon that ground, but upon the notion that during the joint lives the husband was in substance the owner, the wife having a mere expectancy, and that the old saying was true that community is a partnership which begins only at its end. We do not perceive how this statement of the wife's position can be reconciled with the old law of New Mexico embraced in 2030, 2031 of the Compiled Laws, 1897, referred to in the dissenting opinion of Abbott, A. J., that after payment of the common debts, the deduction of the survivor's separate property and his half of the acquest property, and subject to the payment of the debts of the decedent, the remainder of the acquest property and the separate estate of the decedent shall constitute the body of the estate for descent and distribution, and in the absence of a will shall descend, one-fourth to the surviving husband, etc. For **if the wife had a mere possibility, it would seem that whatever went to the husband from her so-called half would not descend from her, but merely would continue his.** The statement also directly contradicts the conception of the community system expressed in *Warburton vs. White*, 176 U. S. 484, 494, that **the control was given to the husband, 'not because he was the exclusive owner, but because by law he was created the agent of community.'** And notwithstanding the citation in *Garrozi vs. Dastas*, 204 U. S. 64, of some of the passages and dicta from authors and cases most relied upon by the court below, we think it plain that there was no intent in that decision to deny or qualify the expression quoted from *Warburton vs. White*. * * *
>
> "It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years. The notion that the husband is the true owner is said to represent the tendency of the French customs. 2 Brissaud, Hist. du Droit Franc, 1699, n.1. The notion may have been helped by the subjection of the woman to marital

power; 6 Laferriere, Hist. du Droit Franc. 365; Schmidt, Civil Law of Spain and Mexico, Arts. 40, 51; and in this country by confusion between the **practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like dominio.** See *United States vs. Castillero,* 2 Black, 1, 227. However, this may be, **it is very plain that the wife has a greater interest than the mere possibility of an expectant heir.** For it is conceded by the court below and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband. *Novisima Recopilacion,* Book 10, Title 4, Law 5. Schmidt, Civil Law of Spain and Mexico, Art. 51. *Garrozi vs. Dastas,* 204 U. S. 64, 78. **We should require more than a reference to *Randall vs. Krieger,* 23 Wall. 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States.''**

In *United States vs. Robbins,* 269 U. S. 315, the Court referred to the latest decision of the Supreme Court of California as showing that *Arnett vs. Reade* would not be followed in that State. The *Phillips* case, specifically citing *Arnett vs. Reade* with approval, shows that the contrary is true in Louisiana. This is further demonstrated by the fact that the law of Louisiana on the two points referred to by this Court in *Arnett vs. Reade* is identical with the law of New Mexico, i. e., in giving to the wife a remedy for alienations made by the husband in fraud of her rights and in providing for the descent to the wife's heirs of the wife's half of the community. See Articles 915, 2404 of the Civil Code of Louisiana.

(4) The Wife's Ownership of Half of the Community Income Has Been Likewise Recognized by Other Federal Decisions and Independent Commentators.

In *Liebman vs. Fontenot,* 275 Fed. 688 (1921), a case which arose in the United States District Court for the Western District of Louisiana, it was held that the wife's

half of the community was not subject to the Federal Estate Tax although her usufruct upon her husband's half was so subject. In the course of his opinion, Judge Jack said:

> "There is this difference in the rights of the wife to her community half of the property and her right to the usufruct of her deceased husband's community half: **The former is absolute; it belongs to her from the time it is acquired by the community.** The husband, as head of the community, has the administration of all of the community property; but, nevertheless, **the ownership rests equally in the two spouses.** Whenever the marriage relation is terminated, whether by death or divorce, the wife may demand her half of the community property in full ownership. **The putting in possession is merely the legal recognition of an existing right.** The wife's usufruct of the community half interest of the deceased husband is not an absolute right, inherent in her. She takes such usufruct only where the husband has not, by will or testament, disposed of his half of the community. Her half of the community is hers by reason of the **partnership** of acquets and gains; the community property is the joint production of the toil and efforts of the two. The usufruct of the property of the deceased spouse, however, is a thing not acquired jointly by the two, but a right transmitted from the husband to the wife, by reason of the law, where there is no adverse disposition by deceased of his community interest. * * *"

This case was decided before the present controversy was even suggested and the language which we have placed in black letters is itself a complete recognition of the proposition which we have emphasized.

The vested and present character of the wife's ownership in community income has been recognized in numerous decisions of the Federal Courts and the Board of Tax Appeals involving States whose community laws are certainly no more favorable to the wife than those of Louisiana. See *Bek vs. Miller,* 8 F. (2nd) 797 (1925); *Rucker vs. Blair,* 32 F. (2nd) 222 (1929); *McLarry vs. Commissioner,* 30 F. (2nd) 789 (1929) and decisions of the Board

of Tax Appeals in *Devaux,* 14 B. T. A. 205; *Ramming,* 6 B. T. A. 188; *Rigsby,* 6 B. T. A. 194; *Henry,* 6 B. T. A. 131; *Phillips,* 9 B. T. A. 153; *Brittingham,* 13 B. T. A. 375; *Miller,* 13 B. T. A. 1081; *O'Neil,* 16 B. T. A. 614. See also the following rulings of the Internal Revenue Bureau: S. O. 121, 5 C. B. 197; I. T. 1414, Internal Revenue Bulletin I-2, p. 170; I. T. 1268, Internal Revenue Bulletin I-1, p. 234; G. C. M. 2892, Internal Revenue Bulletin, VII-1, p. 158. See also decisions of lower courts in the present litigation: *Pfaff vs. Bender,* 38 F. (2nd) 642; *Bender vs. Pfaff,* 38 F. (2nd) 649; *Bacon vs. Hopkins,* 27 F. (2nd) 140; *Hopkins vs. Bacon,* 38 F. (2nd) 651; *Seaborn vs. Poe,* 32 F. (2nd) 916.

The vested ownership of the Louisiana wife in half of the community property was specifically recognized by the Attorney General of the United States in his opinion to the Secretary of the Treasury, dated February 26, 1921, 32 Op. Atty.-Gen. 435, embodied in Treasury Decision 3138, Internal Revenue Cumulative Bulletin No. 4, page 238. A similar conclusion was reached by Prof. Evans in an article on "The Ownership of Community Property" in 35 Harvard Law Review at page 63.

The modern French commentators upon the Code Napoleon, upon which the Louisiana law is largely based, likewise recognize the wife's half ownership in community property. See Baudry-Lacantinerie, Vol. 13, Sec. 247; Planiol et Ripert, Traite Pratique de Droit Civil Francais (1925) Vol. 8, Sections 516, 156-8.

(5) The Wife's Ownership of One-Half of the Community Property and Income Will be Recognized in Common Law States When Community Property is Removed from Louisiana to a Common Law State.

In *Depas vs. Mayo,* 11 Mo. 314, the husband and wife while domiciled in Louisiana acquired community funds which the husband invested in land in Missouri. The parties were divorced in Louisiana and thereupon the wife brought in Missouri an action to subject the land to her

right. The Court maintained her suit and held that the wife was entitled to a half interest in the land, saying:

> "It must be assumed then that Mrs. Depas was by the laws of Louisiana entitled to one-half of the estate, both real and personal, belonging to the community of which her husband was the head, and that Depas upon his removal to St. Louis invested a portion of this community property into real estate."

The Court held that inasmuch as the wife was the owner of one-half of the money which had been invested in the real estate, she was entitled to a half interest in the real estate which had been purchased. See also *T. C. Phillips, Petitioner, vs. Commissioner*, 9 B. T. A. 153 (1927); *Succession of Popp*, 146 La. 464.

The Treasury Department has also recognized this rule in the application of the Income Tax Law, in Solicitor's Opinion 121, reported in Internal Revenue Cumulative Bulletin for December, 1921, at page 197.

(6) The Wife's Interest in Community Income Is so Substantial That It Could Not Be Constitutionally Impaired by Retroactive Law.

The right of the plaintiff's wife in one-half of the community income is so substantial and the husband's power over it is so incomplete that a law which undertook to divest the wife's interest in the community income which is the subject of this litigation, would be unconstitutional. This was so held in *Dixon vs. Dixon's Executors*, 4 La. 188, and *Arnett vs. Reade*, 220 U. S. 311. In the former case, Judge Porter said:

> "If, therefore, by the law of the country where the marriage took place, a community of acquets and gains was declared to be created by the marriage, or, in the language of our Code, superinduced of right by the contract, we should think that a subsequent law, declaring there should be no further community between the persons who had entered into this engagement, would be retrospective, and as much a violation of rights vested under the contract, as a sta-

> tute would be, which would alter the obligations imposed, or impair the rights acquired, under a contract of sale or of lease."

In *Arnett vs. Reade* Justice Holmes said, speaking of the community interest of the wife in New Mexico where the legal situation is the same on this point as Louisiana:

> "We should require more than a reference to *Randall vs. Krieger,* 23 Wall. 137, as to the power of the Legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

If the husband in fact had complete dominion and control over the wife's interest in community income, there would be no constitutional objection to a statute being passed today by the Louisiana legislature providing that the plaintiff's wife in this case should have no further right in the community income for 1927 which is involved in this litigation. If the husband were the substantial owner of the income because of a complete control and power to use it as he saw fit so as to make it lawful to tax it to him as his own, it would indeed be attempting a distinction without substance to say that the Legislature could not pass a statute providing that she should have no manner of right with respect to it, could not will it away, could not obtain possession of it by a separation of property or a divorce. For if the husband substantially owns it, the wife could have no ground of complaint against a statute which took nothing from her. The decisions holding that such a statute could not be constitutionally enacted show that the wife in fact owns the interest. If she does and it cannot be constitutionally taken away from her, then it cannot also belong to the husband and be taxed to him as his own.

We pass from this review of the cases containing a general characterization of the Louisiana wife's vested ownership in community property to a summary of the particular rights of the wife and the particular limitations

upon the husband which justify the general characterization and demonstrate the real and substantial ownership of the wife.

B.

EVEN IF CONGRESS COULD BE SAID TO HAVE INDICATED AN INTENT TO TAX INDIVIDUALS UPON THE BASIS NOT OF OWNERSHIP OF INCOME BUT OF "MANAGEMENT AND CONTROL" OR "ENJOYMENT" OR "UNFETTERED COMMAND," THE LOUISIANA HUSBAND CANNOT BE TAXED UPON THE ENTIRE COMMUNITY INCOME BECAUSE HE HAS NOT UNFETTERED COMMAND OR CONTROL OR ENJOYMENT THEREOF UNDER THE LOUISIANA LAW.

(1) The Husband in Louisiana is Merely a Managing Partner, Administrator or Agent.

Article 2399 of the Louisiana Code, quoted *supra,* specifically describes the community as a partnership. Article 2404 of the Code recites that:

> "The husband is the head and manager of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title without consent and permission of his wife."

These provisions upon their face make the husband a managing partner.

In *Childers vs. Johnson,* 6 La. Ann. 634 (1851), at page 641, the Supreme Court of Louisiana, in dealing with a case where moneys acquired after marriage had been used to pay a debt incurred by the wife prior to marriage, said:

> "This partnership, the intervenors, who are creditors of the community, have a right to consider as a legal entity; **like other partnerships,** it must be contemplated as an ideal being, *etre moral,* distinct from the persons who compose it, having its rights and its obligations, its assets and its liabilities, its debtors and its creditors. Mrs. Patton is not the

debtor of her husband for the $2000 expended for her benefit. She is the debtor of the community. She owed this debt before her marriage. The community derived no benefit from its creation. Instead of paying it with her own money, it has been paid with money of the community. * * * Is she permitted thus to enrich herself, at the expense of the community, and of *bona fide* creditors of that community? Clearly not. This results from that general principle **applicable to all partnerships,** which is, that a partner must account to the partnership for what he has drawn from it for his individual business and advantage. * * *"

(2) The Husband Cannot Convey Community Income Invested in Real Estate Except for Valuable Consideration Which Becomes Itself Part of The Community.

Article 2404 of the Louisiana Civil Code provides that the husband as head and master of the partnership may dispose of its revenues without the consent of his wife only by an *onerous* title. The second paragraph of the article further provides that:

> "He can make no conveyance *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage."

In *Melady vs. Succession of Bonnegent,* 142 La. 534 (1917), it was held that:

> "A conveyance by gratuitous title of immovable property belonging to the community by the husband as head and master thereof and during the existence of the said community is null and void; and the only exception to the rule of law thus announced, in Article 2404 of the Civil Code is where such a conveyance is made for the establishment of the children of the marriage."

Bister vs. Menge, 21 Ann. 216 (1869):

> "The power of the husband to dispose of the community property is limited to that of alienation by a sale or otherwise where an equivalent in

value is impliedly received for the property disposed of."

"The husband is prohibited from making any conveyance *inter vivos* of the immovables of the community by gratuitous title."

In *Radovich vs. Jenkins,* 123 La. 355 (1909), the Court said:

"The owner had parted from his wife and his apparent motive was to deprive her of her community rights in the property. The purchaser has not attempted to prove that Radovich intended to make a donation of all his real estate. Such a donation would have been void as the law declares that the husband can make no conveyance *inter vivos,* by a gratuitous title, of the immovables of the community, unless it be for the establishment of the children of the marriage."

Compare also *Snowden vs. Cruse,* 152 La. 144 (1922) and *Ramsey vs. Beck,* 151 La. 190 (1922).

The immovables of the community may represent the entire community income. The husband's power over this income is therefore subject to the substantial limitation that he can dispose of the community real estate only by selling it for value, in which event of course the consideration received is itself community property to which the wife's half interest attaches. See *Phillips vs. Phillips, supra,* citing *Warburton vs. White, supra.*

(3) The Husband Cannot Dispose of the Whole or a Quota of the Movables Except for a Valuable Consideration which Itself Becomes Part of the Community.

The second paragraph of Article 2404 makes the limitation governing donations of immovables applicable also to the whole or a quota of the movables. He can dispose of these also only by **onerous** title, which means for valuable consideration, which would itself become community property and to which the rights of the wife would attach. See *Succession of Moore,* 42 Ann. 332, at page 341, where it is said:

"Nor does this contention rest on argument alone, for the Code provides that the husband 'can make no conveyance *inter vivos* by a gratuitous title of the immovables of the community, nor of the whole, or of quota of the movables, unless it be for the establishment of the children of the marriage.' R. C. C. 2404.

"While this article primarily applies to strangers and third persons, yet it may be applied with equal propriety to a partner in community. While 'the husband is the head and master of the community,' and may dispose at will, or alienate its effects 'by an **onerous** title,' he can not divest his wife of her interest 'by a gratuitous title'."

The first paragraph of Article 2404, which provides that the husband is the head of the community, says that

"he administers its effects, disposes of the revenues which they produce and may alienate **them by onerous** title. * * *"

The word "**them**" obviously refers to "revenues" and thereby imposes a direct limitation upon the power of the husband to dispose of them except for a valuable consideration to which the wife's rights would attach.

As the District Judge in his opinion in this case held (R. 21), the effect of these provisions is that the husband may not donate either the whole of the movables or any considerable portion thereof and that he may donate particular objects of personalty *only subject to the prohibition against any act whatsoever by him which may defraud or injure the wife.* This important prohibition is discussed in the succeeding section of this brief.

(4) The Husband Cannot Dispose of Community Income by Fraud to Injure the Wife.

The last paragraph of Article 2404 of the Louisiana Code reads as follows:

"But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in

> support of her claim in one-half of the property, on her satisfactorily proving the fraud."

These provisions are not in the Code Napoleon (from which many of the Louisiana codal provisions were literally taken) but appear to have been borrowed from ancient laws of Spain as pointed out by Judge Porter in the *Dixon* case quoted *supra.*

The Supreme Court of Louisiana has indicated its opinion that in a case where the wife can show that the husband has alienated property of the community in fraud of her rights, she may obtain protection by obtaining a separation from bed and board or a separation of property upon proper proof. See *Smallwood vs. Pratt,* 3 Rob. 132 (1842), where, after quoting Article 2373 of the Code of 1825, corresponding to Article 2404 of the present Code, the Court said:

> "Although this law seems to contemplate only the case of a dissolution of the community by the death of the husband, yet the wife would not, perhaps, be without relief in case of a separation from bed and board were it proved that the husband had alienated property of the community in fraud of her rights."

The decisions hereinafter referred to show the tendency of the courts of Louisiana to permit a wife to obtain a dissolution of the community by a separation of property whenever she can show that her husband is an unreliable administrator; and a conveyance of the community property in an attempt to injure the wife would under these authorities undoubtedly entitle the wife to demand an immediate separation of property, a dissolution of the community and the making good of the injury done to her. So, also, as hereinafter indicated, even if the husband's business management has given no ground of complaint but his personal conduct has been such as to entitle the wife to a separation from bed and board, she may, in proper proceedings, obtain retribution for any injury done to her by disposition of community property in fraud of her

rights and an injunction against his further administration of the community property.

(5) Whenever the Husband Proves a Bad Manager the Wife May Obtain a Dissolution of the Community Without Seeking a Divorce or Personal Separation and May Enjoin the Husband from Further Management of Community Partnership Property.

The Louisiana law protects the wife against her husband even in the absence of fraud when he is a *reckless administrator* and is *mismanaging the community* or when *the disorder in his affairs endangers her property rights.* In such cases, the wife in Louisiana can immediately demand a separation of property which carries with it a dissolution and liquidation of the community. It is to be particularly noted that this right to sue for a separation of property and provoke a dissolution of the community can be exercised by a wife living with her husband without involving in any way a divorce or personal separation.

A separation of property in Louisiana is entirely different from a separation from bed and board. A separation from bed and board is a personal separation and a step towards divorce. See Articles 140 to 161 of the Louisiana Civil Code. Separation of property which is provided for by Articles 2425 to 2437 of the Louisiana Civil Code, quoted in the appendix, has no relation whatsoever to divorce or separation from bed and board. A separation of property may be had while husband and wife continue to live together in the utmost personal devotion and is similar to a dissolution and liquidation of an ordinary partnership. A separation from bed and board entails a separation of property (Louisiana Civil Code Article 155), but a separation of property does not imply a separation from bed and board.

It is well settled in Louisiana by the cases hereinafter cited, not only that a separation of property may be

obtained by the wife when the husband *mismanages* the community partnership property, or his *affairs are in disorder,* but that the wife obtaining such a separation of property is also entitled to *immediate dissolution and liquidation of the community partnership property.* The wife under such circumstances receives immediate possession and control of her half of the community property existing at the date of the separation of property, free and clear of the future administration and control of the husband, and by virtue of the dissolution of the community each spouse thereafter manages his or her property and all property thereafter acquired belongs as separate property to the spouse acquiring it. See *Davock vs. Darcy,* 6 Rob. 342 (1844) *Jones vs. Morgan,* 6 Ann. 630 (1851); *Wolfe & Clark vs. Lowry,* 10 Ann. 272 (1855); *Mock vs. Kennedy,* 11 Ann. 525 (1856); *Webb vs. Bell,* 24 Ann. 75 (1872); *Vickers vs. Block,* 31 Ann. 672 (1879); *Chaffe vs. Watts,* 37 Ann. 324 (1885); *Brown vs. Smyth,* 40 Ann. 325 (1888); *Walmsley vs. Theus,* 107 La. 417 (1902); *Gastauer vs. Gastauer,* 131 *La.* 1 (1912); cf. opinion of District Court in this case, R. 21.

The doctrine of these cases was recognized and followed by this Court in *Carite vs. Trotot,* 105 U. S. 751 (1881).

The reasoning adopted in the cases cited indicates that the wife may sue for separation of property whenever the husband proves a bad or reckless manager and *a fortiori* whenever he disposes of community income to injure her rights. In *Jones vs. Jones,* 119 La. 677 (1907), the Court indicated that the wife might invoke this remedy upon proof that the husband was of a *speculative disposition* and daily incurring debts. This decision was cited with approval in *Larose vs. Naquin,* 150 La. 353 at 358 (1922).

When the wife sues for separation of property, she may immediately obtain an injunction restraining the husband from further dispositions of community property.

This is specifically provided for by Article 298 of the Louisiana Code of Practice which recites that:

> "Art. 298. The injunction must be granted and directed against the defendant himself in the following cases: * * *
>
> "6. When a woman has sued her husband for a separation of property or for a separation from bed and board and fears that he will during the pendency of the suit dispose to her prejudice of the property either held in the community or on which she has a privilege for her dotal rights."

The wife is also entitled upon suing for a separation of property to an **accounting** from the husband for community income or property in his hands and **to reimbursement and retribution for any act done by him in fraud of her rights.** See *Hill vs. Hill,* 115 La. 489 (1905); *White vs. White,* 159 La. 1065 (1925), and *Smallwood vs. Pratt, supra.*

This right of the wife to force a dissolution and liquidation of the community, in case the husband is guilty of mismanagement, or his affairs are in disorder, is a serious limitation and check on the husband's authority as manager of the marital partnership and a substantial safeguard established for the benefit of the wife and the protection of her property rights. This very practical remedy given by the Louisiana law to the wife is consistent only with the theory that the husband is an administrator or managing partner, and that the wife has a real ownership in half of the community property administered by the husband, which the Louisiana courts will protect. In California and common law states there is no such restriction placed on the husband in relation to property, because the husband in California and common law states is complete and unqualified owner of all property acquired by him subsequent to marriage.

(6) Even If the Husband is a Good Business Manager the Wife May Terminate His Administration by Suing for Divorce or Personal Separation Whenever He is Guilty of Misconduct and May Then Enjoin Him from Further Management or Disposition of Community Property.

The wife's right to terminate the husband's management and to take possession and control of her interest in the community property may be asserted not only when the husband has proven a bad business manager or has been guilty of fraud in the administration of the community property but whenever he proves an unfaithful partner or an unworthy husband. Thus, the wife may sue for a separation from bed and board for any one of the seven causes provided in Article 138 of the Civil Code, including habitual intemperance, cruel treatment, abandonment, adultery, defamation and conviction of an infamous crime. A separation from bed and board carries with it an immediate separation of property and a dissolution of the community under the provisions of Article 123 of the Civil Code. Article 159 provides for a similar result in the case of a divorce.

> "Art. 123. The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains."

(Note: Since Act 94 of 1916, the wife never requires the husband's authorization.)

> "Art. 159. The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them."

During the pendency of the suit for separation, the wife may under Article 149 of the Civil Code and Article 298 of the Code of Practice obtain an injunction restraining the husband from disposing of the community property

and under Article 150 of the Civil Code, from the day on which the separation action is instituted, the husband is ousted as administrator of the community. The Articles of the Civil Code read:

> "Art. 149. During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisement to be made for the movables and immovables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner.
>
> "Art. 150. From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debt on account of the community, nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife."
>
> See also Articles 123, 136 and 155.

The provisions of these Articles are frequently invoked. See *Dillon vs. Dillon,* 35 La. Ann. 92 (1883); *Succession of LeBesque,* 137 La. 567 (1915); *Crochet vs. Dugas,* 126 La. 285 (1910); *Williams vs. Goss,* 43 Ann. 868 (1891); *McClelland vs. Gasquet* 122 La. 241 (1908):

In the case last cited, the Court said:

> "As relates to the law, we have this to say: A wife who has sued for separation from bed and board has a right to an injunction if there is danger that the husband will dispose of the property on which she has a right during the pendency of the suit; that is, when he is about to dispose of **community property** to her prejudice, or property on which she has a privilege or dotal right. The community property of spouses falls *eo nomine* under the terms of the law."

In *Hill vs. Hill,* 115 La. 490 (1905), the Court held that:

> "Where a wife obtained judgment of separation from bed and board and subsequently sued for partition of community property in settlement of accounts, **held** that the **burden of proof was on the husband to account** for all community property

> shown by his books to have been in his possession a few months prior to the dissolution of the community."

See also *White vs. White*, 153 La. 313 (1923), 159 La. 1065 (1925) where the husband was required to account elaborately to the wife for community property in his hands when the divorce suit was filed.

In *Lockhart vs. Dickey*, 161 La. 282 (1926), the husband had sued for a separation from bed and board on the ground of abandonment. While the suit was pending, the husband purchased stock in a Building Association for which he paid with moneys which he had made prior to the filing of the separation suit. He caused the certificates for the stock to be issued in the name of another woman (the defendant, Dickey). Thereafter, the husband died and the widow joined in a suit against the defendant, Dickey, alleging that the stock had been registered by the husband in defendant's name as a

> "fraudulent simulation intending to cover up the said stock and screening it against the community claims of the wife from whom he was then seeking a separation and to whom he would have to account for one-half thereof. (R. C. C. Art. 2406). * * *"

The court held the wife entitled to prevail because

> "The whole transaction was a simulation pure and simple, done by the husband for the sole purpose of covering up the property and screening it from the knowledge and claims of his wife."

(7) Even If It is the Wife Who Has Been Guilty of Misconduct and It is the Husband Who Obtains the Divorce, the Wife is Still Entitled to One-Half of the Community Income.

A wife in Louisiana, who is guilty of adultery or any of the numerous other causes justifying a divorce or separation from bed and board, and from whom the husband obtains a divorce, is still entitled, under the law, to one-half of all of the community property, which is synonomous with all income accrued since marriage, irrespective

of the fact that she may have contributed nothing to those earnings, and that they may be due to the unaided efforts of the husband, to whom she has been a burden rather than an aid. She has the unquestioned legal right in Louisiana even under such circumstances, to obtain a liquidation and dissolution of the community partnership, and to require the husband to deliver to her half of all of the community partnership property, for the reason that it belongs to her as part of the community partnership assets acquired during marriage. This result follows necessarily from the express and unconditional provisions of the Articles of the Code heretofore quoted which provide that the husband's administration ceases and that the community partnership is dissolved and must be liquidated upon the granting of a separation from bed and board or a divorce without reference to the cause therefor and without reference to which spouse obtains the divorce or separation or which of them is at fault. See also *Nichols vs. Her Husband,* 7 La. Ann. 263 (1852); *Ford vs. Kittredge,* 26 La. Ann. 190 (1874); *Crochet vs. Dugas,* 126 La. 285 (1910); *Succession of Le-Besque,* 137 La. 567 (1915). The court decreeing the separation or divorce has no discretion in the premises. It can do nothing but liquidate the community partnership and deliver to the wife her full half of the community property or income. It is bound to deliver her half to her even though she has abandoned her husband and children and eloped with another man with whom she is living in adultery. The wife's rights in this regard are entirely independent of claims which she may have for alimony which are regulated by separate statutory provisions, having no relation to community rights. See Act 21 of 1928 amending Article 160 of the Civil Code.

Contrast the position of the undutiful wife in Louisiana with her position in a common law state where, if she deserts her husband, elopes with a lover or is otherwise at fault, she may be divorced and has no pecuniary claims

of any character for alimony or otherwise. The reason for the different result in Louisiana is that the Louisiana wife as a marital partner owns one-half of the community property and when the community is dissolved by reason of divorce, even though such divorce be for her fault, her personal misconduct in no degree impairs her property right. Thus, a husband who has by many years of effort accumulated a fortune and whose wife has deserted him to live with another man may be compelled to turn over to his wife one-half of all his accumulations since marriage in order that she may share them with her lover.

It is clear from the foregoing that the plaintiff, Mr. Pfaff, in this case might, upon a separation or divorce or a separation of property at any time during the year 1927, have been required to deliver to his wife the half of the community income belonging to her and upon which he now properly objects to being taxed.

(8) If the Husband Uses Community Income to Improve His Separate Estate or Pay His Separate Debts, His Separate Estate Becomes the Community's Debtor.

That the husband has not "unfettered command" of the community property and cannot exercise "exclusive rights" of management and "enjoyment" over it is further demonstrated by his inability to use community partnership income as he sees fit without accountability. Thus, if he uses any part of the community partnership income for the benefit of his separate estate, he becomes a debtor of the community to the extent to which his separate estate has been enhanced in value (see Article 2408 of the Code). If he pays his separate debts out of the community funds, his separate estate must reimburse the community for the actual amount so paid.

> "Article 2403: In the same manner the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, while the debts of

> both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects."

In *Glenn vs. Elam*, 3 Ann. 611 (1848), it was held that even if the monies used by the husband to pay his separate debts are **revenues from his separate estate,** (which under the law of Louisiana fall into the community), he becomes indebted to the community for the amount of such revenues so used and must reimburse the community therefor, the Court saying at page 615:

> "It has been contended that the Gillespie community is not entitled to recompense for the debts of the husband, paid by him during the community, out of revenues arising from his separate estate. If the revenues of the estate of the husband formed a part of the community, and we do not understand this to be questioned, their origin does not affect the right of the community to exact remuneration for the payment of debts to which they may have been applied."

Thus, in Louisiana, if a husband when married owned a piece of commercial property, and he takes the rents after his marriage to pay a debt which he owed at the time of his marriage (even, let us suppose, a debt for the purchase price of the property), he will become indebted to the community for the rents thus used. And in the present case if Mr. Pfaff had taken a portion of the salary which he earned in 1927 and used it to pay a debt which he owed when he married, he would become responsible to the community for the amount of salary thus employed; and in the event of a separation of property or if he divorced his wife today, even for her fault, she could compel him to account to her for the amount of salary which he had thus employed. What could more clearly demonstrate the wife's ownership in the community fund? If Mr. Pfaff could not use his wife's half of the salary to pay his debts without being accountable therefor, why should he pay an income tax on his wife's half of the salary which he has no right to use?

In *Dillon vs. Freville,* 129 La. 1005 (1912), it was held that if the husband exchanges separately owned immovable property for other like property with money "to boot," he and his estate become indebted to the community for the amount of the money in the absence of proof that the money was his separate property. The right of the wife to assert a demand against the husband's separate estate for community funds used by him to improve his separate estate was again recognized in the *Succession of Casey,* 130 La. 743 (1912) and *Succession of Goll,* 156 La. Ann. 910 (1924). Compare *Childers vs. Johnson,* 6 La. Ann. 634 (1851).

Of course, if the husband had "unfettered command" over community income, or if he exercised "exclusive rights of management and enjoyment over it", he would be under no obligation to account to his wife when he used it to pay his separate debts or to improve his separate property.

It is no answer to suggest, as does the Government in its brief, that the husband's liability to the community for funds appropriated by him to the improvement of his separate property may be limited to the enhancement in value of his separate estate and may, therefore, not extend to the actual amount of community funds diverted. The point is that the husband cannot do as he pleases with the community income. It is the fact of his accountability and not the precise extent thereof that is important. Moreover, the Government concedes that the rule restricting the husband's liability to amount of enhancement in value does not apply to the use of community property for the purchase of separate property or the payment of the husband's separate debts, for the husband becomes liable for the full amount so used and no question of limiting his accountability to enhancement in value of the separate estate is open in such cases. If the husband were either technically or substantially the owner of community funds as the

Government is claiming, he would be entitled to use them as he "chooses", and would not be accountable at all or to any extent.

(9) The Husband Can, by His Will, Dispose Only of His Half of the Community and Is Powerless to Affect the Wife's Half.

The husband's lack of dominion over half of the community income is illustrated by the fact that if he makes a will disposing of this income, the will passes only his half interest therein, and is entirely ineffective as to the wife's half. If Mr. Pfaff, the plaintiff in this case, had died in December, 1927, the year here involved, leaving a will bequeathing all of the salary which he had made during the year to a designated legatee, the will would be ineffective to pass anything more than half of that salary, the remaining half being the property of the wife and beyond Mr. Pfaff's control. The correctness of this proposition requires no demonstration to a Louisiana lawyer, but it is illustrated by cases heretofore cited in this brief. See R. C. C. 915; *Theall vs. Theall,* 7 La. 226 (1834); *Ramsey vs. Beck,* 151 La. 190 (1922).

How can the husband be said to have "unfettered command" over the community income or "exclusive rights of management and enjoyment" over it when he cannot will half of it to whom he pleases?

(10) The Wife May, By Her Will, Dispose as She Sees Fit of Her Half of Community Income and Her Husband is Powerless to Prevent It.

The converse of the husband's lack of testamentary power over the wife's half of the community income is illustrated by the completeness of the wife's power of disposition of her half. The wife can will her half of the community property to any one she chooses, even to a lover, and when she dies, the husband must by agreement, or ju-

dicial partition, sell the community property and liquidate any and all business ventures in order to deliver the value of half of the marital partnership property to the legatee of the wife. (Civil Code Articles 915 and 916; *Succession of Hayes,* 33 La. Ann. 1143; *Succession of Moore,* 40 La. Ann. 531). So, even a wife guilty of adultery might leave her half of the community property to her lover; and if she had not lived in open concubinage with him, so as to come within the special inhibition of Article 1481 of the Code, her will would be entirely valid and her surviving husband would be compelled to account to her lover-legatee for one-half of all community property and income. Thus, any husband in Louisiana who made, in 1927, a substantial income which fell into the community might be compelled upon the death of his wife, to pay over one-half of that income to any person whom she had designated. Yet, the Government in this case contends that he is subject to a tax upon that part of the income which is thus within his wife's control!

It is only on the theory that one-half of the community belongs to the wife that the law gives her the right of testamentary disposition of half of the community partnership property and income. At common law and in California a wife cannot, by will, dispose of one-half or any amount of the property acquired by the husband during the marriage since it belongs solely to the husband, and the wife has no interest whatsoever therein.

(11) If the Wife Dies Intestate, Her Half of the Community Partnership Property and Income "Descends" to Her Heirs and Her Husband is Powerless to Prevent It.

The above rule is expressly announced in the Revised Civil Code of Louisiana.

> "Art. 915. When either husband or wife shall die, leaving neither a father nor mother, nor descendants, and without having disposed by last will and testament, of his or her share of the community pro-

perty, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother, or the survivor of them, and the other portion shall go to the surviving spouse." (As amended by Act 160 of 1920, p. 250.)

In *Bossier vs. Herwig,* 112 La. 539 (1904), the Court said:

> "This Court has repeatedly held that when the community is dissolved by the death of the wife, the interests of the wife's heirs at once attach. *Germay vs. Gay,* 9 La. 580; *Addison vs. N. O. Savings Bank,* 15 La. 529; *Tugwell vs. Tugwell,* 32 La. Ann. 848; *Murphy's Heirs vs. Jurey,* 39 La. Ann. 785; *Glasscock vs. Clark,* 33 La. Ann. 584; *Dumestre's Succession,* 42 Ann. 411; *Landreaux vs. Louque,* 43 La. 234."

In *Brooks vs. House,* 168 La. 542 (1929), a case which came to the Supreme Court on a certificate from the Court of Appeal applying for instructions, it was held that even the illegitimate children of the wife, born before her marriage and not the children of her husband, were entitled on her death to inherit her share of the community estate to the exclusion of the surviving husband.

(12) The Wife, Upon the Death of the Husband, Takes Possession and Administration of Her Half of the Community property as Owner and not as Heir and Since the Wife is Owner in Her Own Right of One-Half of the Community Property She is not Required to Pay Either a State or Federal Inheritance Tax Upon That Half.

Upon the death of the husband the wife takes possession of half of the community property and income in her own right and not as heir, see *Burton vs. Brugier,* 30

La. Ann. 478 (1878), and *Webre vs. Lorio,* 42 La. Ann. 178 (1890), and pays no inheritance tax to the State upon this half of the community property which she owns in her own right. *Succession of Marsal,* 118 La. 212 (1907) and *Coreil's Estate,* 137 La. 702 (1915). See also *Liebman vs. Fontenot,* 275 Fed. 688 (1921), recognizing that the half interest belonging to the wife in her own right is not subject to the Federal Estate Tax (which has never been questioned by the Federal Tax authorities).

The rules we have stated are settled law in Louisiana. At common law all of the property acquired by the husband during marriage belongs to him alone, and, accordingly, upon his death *descends* to *his* heirs and his heirs must pay both State and Federal inheritance taxes.

(13) If the Wife Dies, Her Heirs or Legatees Pay Both State and Federal Inheritance Taxes on Her Half of the Community Partnership Property and if the Husband Happens to be the Legatee or Heir of His Wife He is Required to Pay Both a State and Federal Inheritance Tax.

If the wife dies, the husband can acquire her half of the community income only if she wills it to him, or if she dies intestate leaving neither ascendants nor descendants; and even in these two cases, he must pay an inheritance tax to the State of Louisiana and an estate tax to the Federal Government upon the half interest which he thus acquires from his wife. See *Succession of May,* 120 La. 692 (1908); *Succession of Popp,* 146 La. 464 (1919); *Liebman vs. Fontenot,* 275 Fed. 688 (1921).

Thus, under the law of Louisiana, if a man has the misfortune to lose his wife, he must pay to the United States and the State of Louisiana a heavy inheritance tax for the privilege of inheriting from her one-half of the property which in California or a common law state would be considered entirely his. Yet, in the present case, the

Government contends that although the wife's half interest in community income does not belong to her husband so that if she dies he must pay an estate and inheritance tax thereon in order to obtain it, yet it must be considered as belonging to him for the purpose of an income tax. We submit that this is in effect blowing hot and cold at the same time.

(14) The Government's Present Contention Is Inconsistent With Its Position in the Application of the Estate Tax.

In applying the estate tax law, the Government has consistently recognized that the local Louisiana law must control in determining the interest left by the decedent; that upon the husband's death, there is accordingly taxable in his estate only one-half of the community property; and that upon the death of the wife, whether before or after the husband, there is taxable the other half of the community property. If Mrs. Pfaff, the wife of the plaintiff in this case, had died on December 31, 1927, during which year there had been accumulated a net community income, as shown by the record in this case, aggregating approximately $30,000, the Government would have asserted the right to an estate tax upon her estate and would have included in her estate one-half of this community income. Yet, if the Government's contention in this case is sound, the entire $30,000 is to be held to be the income of Mr. Pfaff individually and taxable to him. How can these contentions be reconciled? Under the State law, which is undisputably the controlling law, Mrs. Pfaff's heirs would be entitled to one-half of the 1927 accumulated income, and Mr. Pfaff would have to make settlement with his wife's heirs for that amount. If, however, the Government prevails in the present case and Mr. Pfaff is taxed as owner of the entire community income, the inconsistent and logically indefensible situation is presented, that while the

wife's heirs are, under the State law, entitled to claim half of the income (because under the State law the wife owns half and this half descends to her heirs) and although the Government, recognizing the controlling character of the State law, levies an **estate** tax on the wife's half of the income so inherited by her heirs, yet at the same time for **income** tax purposes the Government has undertaken to tax the **same** income to the husband as his property!

C.

REPLIES TO CONTENTIONS OF THE GOVERNMENT

The Point Made by the Government That the Husband Cannot, While the Wife Can, Avoid Personal Liability for Community Debts, Does Not Indicate That the Wife is Not Joint Owner of the Community Partnership Property Since the Husband Must be Reimbursed by the Community and the Wife's Position Corresponds to That of a Special Partner.

The Government concedes (its brief, page 34) that the husband cannot be personally held for community debts until the community property has been exhausted. This fact and the further fact that if the husband does pay community debts out of his separate estate he is entitled to reimbursement (C. C. 2403, 2409), show that his liability for community debts is only that of a surety. Moreover, the power to renounce given to the wife is nothing more than a limitation of her liability for community partnership debts to her share of the community partnership property corresponding to the limitation of liability enjoyed by a *special* or silent partner in a limited partnership, now recognized, we believe in every common law state, or, as it is called in Louisiana, a partnership *in commendam*. Such a *special* partner is under no personal liability beyond the share which he has contributed to the partnership capital; and such a partner cannot participate at all in the management or control of the partnership enterprise. See Rowley on Partnership, Section 1000. Com-

pare Articles 2839 *et seq.* of the Louisiana Civil Code, including particularly Articles 2844 and 2849. So the husband's position as managing partner corresponds to that of a general partner in a limited partnership. While the special partner's liability is limited to his share in the partnership assets, the liability of the general partner is unlimited because it is he who has the control and administration of the partnership. The same result and the same reasons for that result apply in the case of the husband as managing partner of the community. The husband's unlimited liability for community debts and the wife's limited liability for such debts are, therefore, no more determinative of their respective rights as owners of the community property and income than are the corresponding liabilities of the special partner and the general partner in determining their property rights. The wife is the owner of one-half of her community partnership's income just as the special partner is the owner of his share of his partnership's income. Both the general and special partners in a limited partnership are everywhere taxed by the Government for income tax purposes upon their distributive shares of the partnership profits (notwithstanding the special partner's freedom from liability for partnership debts in excess of his capital contribution) as indeed every other kind of business partner is, whether the profits are actually distributed or not; and so, the wife, as a partner in the marital partnership, is and should be taxable on her distributive share of the community partnership income, notwithstanding her freedom from liability for community debts exceeding community assets. Conversely, the husband is not taxable upon the wife's share; he is taxable only upon his share, and is no more taxable upon the entire partnership income than is any managing partner.

The Wife's Interest is No More "Residuary" Than Any Partner's Interest in Partnership Assets.

The same general partnership analogy answers the Government's emphasis upon the fact that the wife's interest in the community partnership is residuary in the sense that, in case of a dissolution of the partnership for any cause, she receives one-half of the community assets and profits only after payment of community debts, and also in the sense that all she may leave by her will or that her heirs may inherit is a half interest in the assets of the community partnership remaining after the payment of community debts. This is equally true of the husband's interest, and the circumstance referred to would, therefore, certainly not justify the taxation of the entire community income to the husband. Beyond this, the circumstance is clearly true of every partner. No partner could dispose of his interest in a partnership except subject to liability for his share in partnership debts, and in this sense the ownership of all partners is "residuary". This is particularly obvious in Louisiana where every partnership is treated as an entity.

Compare *Claiborne & Mather vs. Their Creditors*, 18 La. 501 (1841):

> "It is the general and settled jurisprudence, that on the dissolution of a partnership all debts due must be first paid, before there is a division among the partners; the fund remains a common stock, and pledged for the payment of the debts of the firm * * *
>
> "Creditors have a right of preference or privilege on the partnership fund, to be first paid; and no partner can assign his share, until the debts of the firm are paid."

In *Dixon vs. Dixon*, 33 La. Ann. 1370 (1881) at page 1374, the Supreme Court of Louisiana directly recognized the analogy between the ordinary partnership and the community partnership upon the point herein under discussion, saying:

> "The interest of the widow in community is residuary only, resembling the interest of an individual partner in the partnership property. It can

only be ascertained and defined after a settlement of the marital partnership."

The wife's interest in Louisiana does not differ in substance from that of any ordinary member of a partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner. A partnership agreement vesting in one of the partners exclusive powers of management and control might be made to terminate only after a definite period of years, with a provision that meanwhile none of the profits should be withdrawn or distributed to the partner. In such a case, when the partnership is dissolved and liquidated at the end of the term provided in the partnership contract, each partner will receive one-half of the assets and profits only after the payment of partnership debts. In case such a partnership is dissolved before the expiration of the term provided in the contract, because of the mismanagement of the managing partner, or some breach of his fiduciary obligation (analogous to a separation of property between husband and wife in a marital partnership), each partner will be entitled to receive in liquidation his half interest in the partnership assets and profits only after the payment of all partnership debts, and in this sense the interest of all partners is, of course, "residuary". Such a case, as we have supposed, would present a situation practically identical with that here involved. The entire partnership income in such a case is not taxable to the managing partner as his. Notwithstanding the fact that the profits were not annually distributed or distributable, and notwithstanding the fact that each partner's interest in the partnership income was of "residuary" character (because it might conceivably be lost by subsequent operations), each individual partner would be required under the Revenue Act to return for taxation each year his share of the profits. Each partner could dispose by will only of his residuary interest in the partnership assets after the debts had been paid. The

position of the Louisiana wife is in all respects the same. Her power under the Louisiana law to control the husband's management in case of dishonesty or for fraud or incompetency by provoking a separation of property is at least as great as the power of any partner in such a case as we have supposed.

The Fact That the Husband is the Proper Party to a Suit Involving the Community Partnership, and that the Wife May Not Bring Suit and is Not a Necessary Party, Does Not Indicate That the Wife is Not Joint Owner of Community Partnership Property in Louisiana.

With certain exceptions, such as suits for separation from bed and board or for divorce, suits for a separation of property, and suits to obtain administration of the community property in case of insanity or absence of the husband, it is true that the husband and not the wife is the proper party to stand in judgment for the community partnership. This general rule is consistent with the Louisiana law and public policy, giving the husband the administration of the community partnership, and is not inconsistent in any way with the wife's existing ownership of half of the community property. A trustee, as a general proposition, can sue and be sued without joining the *cestui que trust,* when the suit is in connection with the administration of the trust property, and this does not affect the legal relationship of the trustee and beneficiary. See R. C. L. "Trusts," Par. 205, *Carey vs. Brown*, 92 U. S. 171. In England and in many states, by statute, suits may be brought by or against a partnership represented by one partner, and it is not necessary to join other partners. See R. C. L. "Partnership," Par. 156. An executor or administrator is usually given the right by local statutes to sue and be sued. In many states, an infant can sue and be sued only through a guardian under court supervision, and the ward has no control of any kind over the litigation. It has never been suggested that such procedural and administrative regulations in relation to the right to sue and be sued,

based on public policy, altered or destroyed substantial property rights. Prior to 1916 the Louisiana wife could not stand in judgment alone even in suits relating to her separate property. Yet no one would have argued that she did not own the property. So, we submit, giving to the husband, as administrator and managing partner of the community, the right to sue and be sued in connection with the handling of its business affairs, in no way detracts from the wife's fundamental property rights and cannot be urged as an indication of ownership in the husband.

The Wife's Interest in the Community Partnership Assets is Liable for Her Separate Debts and May be Reached by Her Separate Creditors.

It is true in Louisiana that just as an ordinary partnership is not liable for the individual separate debts of any partner, so the community partnership is not liable as such for the debts incurred by the wife alone which constitute her separate debts. The wife's interest in the community property may however be reached eventually by her separate creditors. Compare Article 2433 of the Louisiana Code which reads:

> "The personal creditors of the wife can not, without her consent, petition for a separation of property between her and her husband.
>
> "Nevertheless, in case of the failure or discomfiture of the husband, they may exercise the rights of their debtor to the amount of their credits."

See also *Rawlins vs. Giddens,* 46 La. Ann. 1136 (1894), *Pior, Tutor, vs. Giddens,* 50 La. Ann. 216 (1898), pointing out the method by which separate creditors may reach the interest of either spouse in the community upon its dissolution. In a State like California, where the wife had a mere expectancy, there would be no interest in the community which her separate creditors could reach if she died before her husband. In Louisiana, the right of her separate creditors to reach the wife's interest in the community property is a present and vested one although the

exercise of it must be deferred until the community is dissolved. Even if the wife were described as enjoying a temporary exemption, during the continuance of the community, from the seizure of her interest therein for her separate debts, that fact would not alter or impair her ownership in the property. Even if a man's property be entirely and permanently exempt from seizure, it would still remain his property, and in this case the wife's property interest in the community assets is not exempt from seizure for her debts but may be levied upon and taken to pay the same whenever the community is dissolved.

The Exemption of the Community Property From Immediate Liability for the Wife's Separate Contracts and Debts, and the Conferring on the Husband the Power of Administration of the Community Property, Reasonably and Naturally Results from the Fundamental Policy of the Louisiana Law in Connection with the Regulation of the Marital Partnership, and Does Not Indicate that the Wife is not Joint Owner of Community Partnership Property in Louisiana.

It is true in Louisiana that the wife has no right, as a general proposition of law, to make independent contracts (other than for necessaries) binding the community without the husband's consent. To permit the wife to make contracts affecting the community partnership or to exercise her independent discretion in relation to the investment and administration of the community funds would be contrary to and inconsistent with the fundamental policy of the community partnership law which gives to the husband the discretionary control and administration of the community, so long as the partnership is not dissolved for one of the various causes provided by law and so long as the husband is an honest, competent and capable administrator and faithful to his fiduciary obligations. If the husband is not *incompetent* or a *bad manager,* or *dishonest* or *guilty of disposing of property in fraud of the*

wife's rights, or if his *affairs are not in disorder,* (all of which are grounds for a separation of property, a termination of his administration and a dissolution and liquidation of the community partnership) the Louisiana law considers the husband the proper person to be given liberal discretion and control with regard to the management of the business affairs of the marital partnership without interference by the wife and the necessary confusion that would result from *dual control.*

The exemption of the community property from liability for the wife's separate debts is based on the same theory. If the wife could make valid independent contracts without the consent and concurrence of the husband which could be enforced against the community partnership property, the husband's control as managing partner would be indirectly destroyed. The wife's ability and power to bind the community for her separate debts and separate independent contracts would, in substance, defeat and destroy the husband's control and discretion in the administration of the community partnership property just as effectively as if the law had specifically given the wife the right to act independently in connection with community contracts without the consent of her husband.

It is clear, therefore, that the discretion vested in the husband by the Louisiana Marital Partnership Law to manage and administer the community would be a vain and useless thing if his control and management could be harassed and defeated by the exercise of similar powers by the wife. If the wife **could contract with reference to the community partnership, or if the community were subject to her separate voluntary contract debts during its existence,** the community partnership would be broken up and endless confusion and chaos would result. Dual control would not only be destructive of the proper administration of the community partnership property, but of marital harmony as well, and would tend to bring about conflict and

dissension between husband and wife. Such is the policy underlying the law of Louisiana that prevents the wife from making voluntary contracts in relation to the community property, (except for necessaries) or subjecting community property to liability for her separate contract debts. When the above limitations on the wife's control of her property are considered in the light of the public policy of the Louisiana law, they are perfectly understandable and are not inconsistent with the wife's proprietary interest in the community partnership.

It must be remembered too, that the wife is **amply protected** when the Louisiana community system is considered as a whole, and her temporary incapacity involves no hardship in view of the other safeguards afforded her. For example, the husband is obligated to supply out of the community all things necessary and proper for the wife's support and comfort, and the wife, in case of a neglect of this duty by the husband, is given the legal right to require it. Furthermore, the wife, although denied the right to interfere with the husband's wise and honest administration of the community partnership property, is, nevertheless, given the right to take possession of her half of the property and remove the husband as administrator, if he is reckless and guilty of mismanagement, or his affairs are in such disorder as to jeopardize her property rights. Moreover, she can hold him accountable if he gives the community property away, uses it for his private advantage, e. g., to pay his separate debts or improve his separate property, or if he disposes of it in any manner in fraud of her property rights. Finally, she can, in Louisiana, dispose of her interest in the community property by will as she sees fit, and she possesses the various other attributes of ownership heretofore outlined in detail.

It is significant to note, in connection with the discussion of the Louisiana law giving the husband, as manager of the community, discretion and control over the com-

munity partnership assets and business, that up to 1916 the husband was given a substantial control over the separate and paraphernal property of the wife. Up to 1916 in Louisiana, the wife, with minor exceptions was legally incapable of exercising the ordinary civil rights. The wife's civil incapacity not only applied to her interest in the community property, but to her **separate and paraphernal property** as well. For example, prior to 1916, a wife could not make a contract or donation, incur a debt, or file a suit, even with reference to her separate and paraphernal property, without the consent of her husband or the court after citation of the husband and a hearing of his objection. (See R. C. C. 121, 122, 123, 124, 125.) Furthermore, the wife could not accept a testamentary executorship (R. C. C. 1664), make a donation *inter vivos* (R. C. C. 1480), or accept a donation (R. C. C. 1545), although she was permitted to make her last will without the authority of her husband (R. C. C. 135, 1480). Thus as a general proposition of law and public policy in Louisiana, the wife, prior to 1916, was practically denied discretion and control both with respect to the community property and her separate property, without the consent of the husband or a judge. In 1916, the Louisiana Legislature removed the civil incapacities of the wife insofar as her separate and paraphernal property was concerned. (See Act 94 of 1916.) Her incapacity and inability to contract or sue and be sued with reference to the community (except for necessaries) were left undisturbed.

It could not have been seriously argued that because prior to 1916 the wife could not freely exercise control and administration even over her **separate property**, and because the husband and courts of Louisiana were given a large degree of control over the wife's separate property, that before 1916 the wife had no vested ownership in her separate property during marriage. Yet such an argument would perhaps be as plausible as some of those suggested in the present case and might be supported by some of

the practical considerations which are urged in the present controversy in relation to the wife's interest in the community property. The husband's administration of the community income, like the administration which prior to 1916 he exercised over the wife's separate property, does not make him owner. It is clear in the light of the statutes cited above, that the general policy of the Louisiana law has been based on the theory that the husband is the proper judge and just and final arbiter in all commercial and civil matters, and the wife has been subordinated with reference to her civil and property rights to his control and discretion in all such matters, subject, however, to the numerous safeguards given to her for the protection of both her community and separate property rights in case the husband is either incompetent or unworthy of his trust.

Analogy of "Spendthrift Trusts"

A strong parallel to the wife's position in Louisiana is to be found in the common law decisions and statutory provisions of many states in connection with the regulation of "spendthrift trusts." Most of the states recognize "spendthrift trusts," and many of them have special statutes providing for the creation of "spendthrift trusts." See Ruling Case Law, "Trusts", Paragraphs 116 to 118. It is possible for property to be put in the hands of a Trustee for the benefit of the *cestui que trust* or beneficial owner of the property, subject to the stipulated condition that the beneficial owner cannot alienate or dispose of his beneficial interest, that the trust property shall not be subjected to attachment for the debts of the beneficial owner, and that the investment, administration and control of the property shall be entirely vested in the Trustee. In such a trust the beneficial owner cannot control the management of the property, cannot decide how the property shall be spent, and cannot sell the property, nor can the property be sub-

jected to the debts of the beneficial owner. A beneficial owner, under such circumstances, cannot interfere in any way with the control and administration of the trust so long as the Trustee properly manages the property and is not guilty of fraud or a breach of trust.

No one would seriously contend that the Trustee of a "spendthrift trust" is the *owner of the property* and that as owner the income of the property should be considered as *belonging to him* for tax purposes, and that he, the Trustee, in making his individual income tax return should include in that return income from the trust property which belongs to another person, for the purpose of calculating the individual surtax of the Trustee because the trust property is under his control and administration and cannot be sold by the beneficiary or immediately subjected to the payment of the debts of the beneficiary. On the contrary, the Revenue Act specifically provides in such a case that the Trustee shall make a separate return for himself as an individual, and another separate return as Trustee for the owner of the trust property. The personal income of the individual who happens to be Trustee is separately returned and his tax thereon is calculated and paid separately. It is obvious that definitions which speak of the right to sell or otherwise dispose of property as an attribute of ownership must be considered in the light of well established exceptions to the general rule.

In the case of "spendthrift trusts," the law takes away from the beneficiary the right to sell or dispose of the trust property or his beneficial interest therein, and likewise exempts the trust property and income from liability for the debts of the *cestui que trust* during the period of the trust, on general grounds of public policy. It has however never been suggested that the beneficiaries of "spendthrift trusts" have not a vested ownership in the property held in trust, because of restriction with reference to the control and administration of the property, nor has it ever

been suggested that the trustee under such circumstances is the real owner, because of his practical control. There is no more reason in Louisiana for the suggestion that the husband, as managing partner of the community partnership property, is the owner by virtue of his administration, and that the wife has no property rights because of the temporary restrictions and exemptions that exist.

The statement in the Government's brief that the "community property is liable for the debts of the husband, but not for the debts of the wife" has been heretofore explained insofar as the wife's exemption is concerned. It is true that in Louisiana the community property is technically liable for the debts of the husband. If, however, the community partnership funds are wrongly used by the husband, as manager of the community partnership, to pay either his separate or prenuptial debts or a separate debt of the wife, the separate estate of the husband or wife, as the case may be, is indebted to the community and must reimburse the community for the expenditure in a settlement of the community partnership. It is not true, therefore, that the husband may use the community to pay his separate debts and do with it "as he pleases", since the law of Louisiana requires that he pay his separate debts out of his separate estate and if he does wrongfully use community partnership property to pay his separate debts, he must reimburse the community from his separate estate for the full amount so spent. See R. C. C. 2403; *Glenn vs. Elam, supra; Childers vs. Johnson, supra; Dillon vs. Freville, supra; Succession of Casey, supra.*

When one stops to consider the intimate, delicate and sacred relationship of husband and wife and the psychological necessities for the peaceful and happy realization of the relationship, and at the same time recognizes that the framers of the historical Civil Law Codes have woven into the marital status a practical commercial partnership, it is astonishing that the dictates of public policy

and adaptive legal philosophy, in reconciling and harmonizing the two legal relationships, have resulted in modifying and restricting ordinary commercial partnership principles so very little.

The Provisions of the Louisiana Law Are in Fact Sufficient to Assure the Wife Management upon Abandonment by Her Husband.

It is said in the Government's brief, page 36, that the Louisiana Civil Code does not contain any "express" provision which makes the wife the manager of the community upon abandonment by her husband similar to the provisions found in the laws of the other community property states. This remark is, however, followed by the statement, "See, however, Articles 57 and 64 *infra.*" The Articles of the Louisiana Code thus referred to expressly give the wife the right to administration if the husband is an absentee. Moreover, the abandonment of the wife by the husband entitles the wife to institute a proceeding for separation from bed and board, which provokes an immediate dissolution of the community and entitles the wife to the immediate delivery of her half of the community property to be administered by her as she sees fit. Such a proceeding by the wife would not dissolve the bonds of matrimony and if the husband returned and a reconciliation were effected, the spouses would continue to live together as husband and wife without remarriage. The powers of the wife upon abandonment by the husband appear, therefore, as extensive as in any other community property state.

Garrozi vs. Dastas, Cited in the Robbins Case and Quoted in the Government's Brief, Arose Under Porto Rican Law, Which is Different From That of Louisiana, and Would Not be Followed in Louisiana.

The Government quotes in its brief from the opinion of this Court in *Garrozi vs. Dastas,* 204 U. S. 64, which was cited also in the *Robbins* case. That case deals with the

right of the husband under the community property law of Porto Rico, which like the California law, is derived from the Spanish law entirely and has not been influenced by the special doctrines of any other systems. The Louisiana law, while influenced to some extent by the Spanish law (since Louisiana was under the dominion of Spain for a portion of the 18th Century), has been modeled chiefly upon the Code Napoleon, more than half of the articles of the Louisiana Civil Code having been literally copied from the Code Napoleon. In the opinion in the *Robbins* case, the *Garrozi* decision is cited in support of the statement that in California "the husband may spend it (the community income) substantially as he chooses, and if he wastes it in debauchery, the wife has no redress." This would not be true under the law of Louisiana, as we have heretofore shown, and *Garrozi vs. Dastas* would not be followed in Louisiana. This was expressly decided by Judge Dawkins in his opinion in the District Court in the present case, in which he said (R. 24-5):

> "* * * However, there are under the Louisiana law, both in its codal provisions and as now settled by the decisions of its courts, two *decided differences* between what the Supreme Court found to be the law of Porto Rico in the *Garrozi* case, to-wit, with respect to the right of the wife to put an end to the community before dissolution of the marriage, and as to her relief against the fraudulent disposition of the common property. It is as well settled under the Louisiana jurisprudence as anything can be, that the wife during marriage, may have the community dissolved whenever the husband has been guilty of *mismanagement*, his affairs are in disorder, *he is dissipated*, or has engaged in speculation, and this whether she has or had any paraphernal or dotal property, but merely for the protection of future earnings from her own industry. * * * Then, as heretofore noted, the last paragraph of Art. 2404 of the Louisiana Code, makes the husband's estate, including his interest in the community as well as his heirs, liable for the value of her half of the community

> property which he 'has sold * * * or otherwise disposed of * * * by fraud, to injure his wife,' in an 'action against the heirs.' So that while the *Garrozi* case may have been sound authority in support of the decision of *U. S. vs. Robbins,* it does not follow that it will sustain a similar conclusion when construing the law of Louisiana. For, in the latter case, Justice Holmes found 'he (the husband) may spend it (the community income) substantially as he chooses and if he wastes it in debauchery, the wife has no redress.' *This is not true in Louisiana.* Here if the wife chooses, she may bring her action at any time when the husband's conduct puts her rights in jeopardy, and have a dissolution of the community and division of its property, including its funds and income. *Gastauer vs. Gastauer,* supra." (Italics ours).

In his opinion in the District Court in this case, Judge Dawkins also quoted the language of Justice White, the organ of this Court in the *Garrozi* case, as follows:

> "Besides, when it is considered that the ancient Spanish law and the law as formulated in the code of 1889, or in the Porto Rican code of 1902, *confers no authority upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs, it follows that the power of the husband under the Spanish system is in principle more extensive than it is under the Code Napoleon and the law of the countries which have followed that code.*" (Italics by the writer of this opinion).

As shown by the language italicized by Judge Dawkins, Justice White himself emphasized the fact that the power of the husband under the Spanish system was in principle more extensive than under the Code Napoleon and the laws of the countries which have followed that code. In support of this statement, Justice White particularly noted the fact that under the Spanish law, no authority was conferred upon the wife to obtain a judicial dissolution of the community merely because of the disorder of the husband's affairs. That right exists, we believe, only under the Code Napoleon and the law of the countries that have followed

that code. It exists, as we have shown, expressly under the law of Louisiana (being provided for by Article 2425 of the Louisiana Code which goes substantially beyond the corresponding Article 1443 of the Code Napoleon). This Court has by the language quoted in effect itself recognized that *Garrozi vs. Dastas* would not be applicable in Louisiana, the laws of which are in fact modeled chiefly upon the Code Napoleon and do expressly give the wife the right to demand a separation in the case either of disorder of the husband's affairs or mismanagement or abuse upon his part. The decisions of the Supreme Court of Louisiana leave no room for doubt but that if the Louisiana husband undertook to do what the Porto Rican husband in the *Garrozi* case did, the wife would not be without redress, as she was under the law of Porto Rico and (according to the *Robbins* case) under the law of California.

The Statutory Rights of the Wife in Common Law States are not Comparable to her Louisiana Community Property Rights.

The Government's brief suggests (pages 19, 20) that the position of the Louisiana wife may be compared with the right which the wife enjoys in other States to have a certain proportion of the husband's estate left to her if she survives him. The provisions referred to in the Government's brief appear to be provisions which make the wife to a very limited extent the forced heir of the husband if she survives him and apparently are enlargements of her common law right of dower. The rights thus assured her are not comparable in importance or extent with the rights of the Louisiana wife in community property.

(a) The rights conferred by statutes in Oklahoma, Minnesota and other States are conditioned upon the wife's surviving her husband. If she dies before the husband, she takes nothing under these statutes nor do her heirs take anything. The wife under these statutes has, there-

fore, nothing more than a hope or an expectancy. But in Louisiana, if the wife dies before her husband, her property will pass to the legatees named in her will or her other heirs and half of the husband's accumulations since marriage must be delivered to them. If she leaves her half to her husband, he must pay inheritance taxes for the privilege of taking what in Minnesota and Oklahoma would be considered his own. Moreover, during her lifetime, the wife herself has it in her power to compel the delivery of her half interest to her whenever the husband proves incompetent, dishonest or even merely speculative. The wife may elope with a lover, force her husband to divorce her and will be then entitled to the immediate delivery of her half of the property. Without undertaking to review again in detail the rights of the Louisiana wife, it must surely be obvious that in character and extent they go far beyond the statutory protection upon the husband's death which is extended to the wife in non-community States.

(b) The difference in character between the Louisiana wife's substantial partnership property rights in the community and the inchoate dower and forced heirship rights of the wife under such statutes as the Government refers to in its brief has been recognized by this Court. Thus, the wife's inchoate dower right may be constitutionally abridged or taken away by statute before the death of her husband (*Randall vs. Krieger,* 23 Wall, 137) while in *Arnett vs. Reade, supra,* in discussing the wife's community interest, this Court said:

> "We should require more than a reference to *Randall vs. Krieger,* 23 Wall, 137, as to the power of the legislature over an inchoate right of dower to make us believe that a law could put an end to her interest without compensation consistently with the Constitution of the United States."

So a forced heir has also merely an expectancy which may likewise be constitutionally divested by statute at any time (*Cordova vs. Folgueras,* 227 U. S. 375), but a statute

undertaking to abrogate the Louisiana wife's community interest would be clearly unconstitutional. See *Dixon vs. Dixon's Executors, supra.*

The Division of Income Between Louisiana Spouses Gives Them No Unfair Advantage.

The residents of common law states who are disposed to think that the division of community income between husband and wife in community States for Federal income tax purposes gives the latter an unfair advantage should stop to consider some of the practical results of the community property law which operate to the disadvantage of the husband. Thus they should consider the case of the husband losing his wife who must pay an inheritance tax for the privilege of obtaining one-half of the income which he has himself accumulated. They should consider also the possibility in a community State that the wife may will to any one whom she sees fit her one-half interest in all of the earnings and accumulations of the husband. They should further consider the right of a wife if the husband proves to be a bad or reckless manager, or of a speculative disposition and involving the community in debt, or if he does any act in fraud of her rights in the community income, to obtain a separation of property, enjoining him from further administration of the community income, and assuring immediate delivery to her of her half thereof. They should consider also the right of the wife upon a divorce, even if she has been guilty of the most glaring misconduct, to receive one-half of the husband's earnings since marriage. They should further consider the husband's lack of power to use what they would consider his own salary for the purpose of paying his antenuptial debts or improving his separate property. Using practical language, these are the penalties which the husband in community States pays for the "privilege" of declining to pay an income tax on the half of the income which belongs to his wife and which accrues to her.

So upon the question of practical advantage or disad-

vantage, it must be borne in mind that the earnings of the wife as well as those of the husband may fall into the marital community in Louisiana. Thus in *Hellberg vs. Hyland*, 168 La. 493 (1929), money and profits made by a wife in real estate speculation with money earned by her were held to belong to the community (even though made with money belonging to the wife's separate estate). In a common law State, the wife's earnings during marriage would be her separate property and she could make them the subject of a separate return upon which she would pay a tax based only upon their amount. If the Government's contention in the present suit is maintained, the husband would have to pay on all the wife's earnings as well as on all of his own, as well as upon dividends, rents and interest upon his wife's separate property under his administration. The accumulation of this income would, of course, increase the tax rates. The resulting tax would be much greater than in a common law State where the wife could make a separate return of her own earnings. It will doubtless be said that this would result from the peculiar provisions of the Louisiana law. But if the **supposed** provisions of the Louisiana law would justify such a result, how much more will the **actual** provisions of our law justify the result for which we contend, by which each spouse may return that half of their community or combined income which under the law of Louisiana belongs to him or to her? If we would not be entitled to complain of the hardship caused by the maintenance of the Government's contention in the present suit because of the **supposed** fact that it would result from the special provisions of the Louisiana law (when in fact it would do violence to those provisions by denying the wife's ownership of one-half of community income), then the Government and taxpayers of non-community States cannot complain of the maintenance of our position in the present case which must result not from supposed but from **actual** conditions of the Louisiana law.

Upon the practical aspects of the question, it may also be pointed out that in many common law States husbands and wives may make voluntary partnership agreements, which may accomplish the same result by convention that the law accomplishes in Louisiana. Where such a partnership agreement has been entered into between husbands and wives in those States, the Commissioner has recognized that each spouse may return his or her distributive share of the partnership income and is liable only for the tax upon such share. A list of twenty-one States in which the Government has recognized that this may be done may be found in 1930 Prentice Hall Tax Service, Section 15,507. In Louisiana, however, a husband and wife cannot become members of a conventional partnership because they cannot contract with each other (Civil Code, Article 1790). To maintain the Government's position in this case will, therefore, in fact expose Louisiana husbands and wives to the payment of greater Federal taxes than husbands and wives in other States who may by agreement establish a community partnership between themselves which the Government recognizes. The Government's position in these States is based upon a recognition and application of the local law. How could it be said that the application of our local community law in this case would accord the Louisiana husbands and wives any greater practical advantage over spouses in other States than the conceded application of the laws of such other States already accords to spouses residing therein, who by express convention establish a partnership or community between themselves?

Still another reply might be made to the argument that the maintenance of the Government's position in this case is necessary to prevent an unfair practical advantage in favor of married persons residing in community law states. There is nothing to prevent the inhabitants of any other state from adopting the Louisiana community law system and thereby obtaining for themselves all of the

supposed benefits which will accrue to the inhabitants of Louisiana from the maintenance of our position in the present suit. If the inhabitants of other states should be of the opinion that it is to their interest to place the burdens and limitations on the husband's earnings and accumulations during marriage and confer upon the wife the substantial property rights in the earnings and accumulations of the husband during marriage which the law of Louisiana confers upon her, nothing will prevent them from changing their law accordingly.

To tax the husband upon the wife's half of the community income on the theory that he has the control thereof because he is the managing partner of the marital partnership, while not undertaking to tax any other managing partner in any ordinary partnership upon the income of his partners upon a similar theory would be an unfair discrimination against Louisiana and its marital partnership law. An attempt to force the husband and wife in Louisiana, who under their local State law are partners in fact, to report the community property in the name of the husband only, when, as a matter of law and practical fact, the husband owns only one-half of the property and income and is merely managing partner for his wife of the other half, will not produce uniformity but will ignore the fundamental law of Louisiana by treating what in Louisiana is in substance a partnership created by law differently from voluntary partnerships in every common law State.

The foregoing considerations show that it cannot in fact truthfully be said that the maintenance of our position in this case would give to the inhabitants of Louisiana any advantage over the inhabitants of other States in the mater of Federal taxation. But such arguments are besides the point in any event. The question involved here is one of law, not of politics or of practical expediency. If, under the law of Louisiana, the husband is not the owner of all the community income but one-half of it belongs to the

wife, the husband cannot be required to pay Federal income taxes upon the half of such income which does not belong to him.

The illustrations given show that, since the laws of each State must determine questions of ownership, it is not possible to attain identical practical results from the operation of the Federal Revenue laws in each of the forty-eight States of the Union. In the Government's brief, it is said that uniformity is desirable. That might equally be said of every so-called commercial statute; and it might with considerable force be contended that it would be desirable for the entire body of municipal or private law in the United States to be identical. But other considerations are more important than the desirability of uniformity and it is impossible for this Court, without violence to the dual character of our Government and the settled rules which the Court has developed, to decide this case upon any principle that Federal Revenue laws must have identical practical result in every State.

No Difficulty Exists in Collecting the Income Taxes Due By The Wife in Louisiana.

We anticipate a reference in argument to the supposed difficulty of collecting the income tax due the Government upon the wife's half of the community income. The supposed difficulty does not exist. It would be the duty of the husband as manager of the community to pay the income tax due by the wife upon her half of the community income and to charge it against her interest in the community. It is clear law in Louisiana that a debt or obligation incurred by the wife during the marriage for necessaries or family expenses or with the husband's approval must be paid out of the community income. Compare *Chaix vs. Villejoin,* 7 La. 276 (1834); *Scanlan vs. Warwick,* 10 La. Ann. 30 (1855); *Cousins vs. Kelsey,* 33 La. Ann. 880 (1881); *DeLesdernier vs. DeLesdernier,* 45 La. Ann. 1364 (1893); *First Natchez Bank vs. Moss,* 52 La. Ann. 1524 at 1528

(1900); *Van Horn vs. Arantes*, 116 La. 130 (1906); *Rennyson vs. Davis*, 6 Orleans App. 251 at 253 (1909); *Gus Mayer Co., Ltd., vs. Gasquet*, 7 Orleans App. 199 (1910). Compare Arts. 119, 120 and 2403 of the Civil Code. In *Gosserand vs. Monteleone*, 159 La. 316 (1925), s. c., 164 La. 398 (1927), the community was held liable for the fees of an attorney employed by the wife to procure for her a separation from bed and board. The obligation to pay the income taxes due the United States by the wife upon a return filed by her with the express or tacit approval of her husband, covering her half of the community income, is certainly no less than an obligation to pay ordinary debts incurred with the approval of the husband or necessaries and family expenses. *Cf. Knoblock & Rainold vs. Posey*, 126 La. 610 (1910), where the community was held bound upon a mortgage made by the wife with the husband's approval. The Government could undoubtedly distrain the community funds or property to compel payment of the income taxes due upon the wife's return as well as of those due upon the husband's return. No difficulty has ever been found by the Government in collecting the income taxes due upon the separate returns of their half of community incomes which Louisiana wives have been filing for now about ten years past and to which the Government made no objection until the decision to require the filing of this suit.

The Decisions in the Corliss and Earl Cases Have no Application to this Case.

In *Corliss vs. Bowers*, 281 U. S. 376, the court was dealing with Section 219 of the Revenue Act of 1924 which expressly provided that where the grantor of a trust had at any time during the taxable year the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year should be included in computing the net income of the grantor. This new provision of the revenue law was inserted as a

clear exception to the general rule and history of the Revenue Act taxing "individuals" on the basis of ownership of income as determined by state law. This amendment specifically taxing the donor of a revocable trust was designed to meet a particular situation, i. e., to prevent individuals from establishing revocable trusts in favor of the members of their families and their friends in order to reduce income taxes, which was formerly done under the law as it had previously existed. No question was open as to the intent of Congress which was clearly expressed and the only point for argument was constitutional power. The court upheld the statute on the ground that

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income whether he sees fit to enjoy it or not."

In the present case the executive and legislative history of the Revenue Acts negative any intent of Congress to tax the community income entirely to the husband because of his powers of management and control. Congress, in fact, has twice rejected amendments which were expressly designed and worded to bring about this result. Furthermore, even with reference to the constitutional question involved in the *Corliss* case, it cannot possibly be said under the Louisiana law, as it was said in the *Corliss* case, that the community income is subject to the husband's "unfettered command".

If the husband had "unfettered command" of the community income, he could without accountability use it to pay his own debts or to improve his own property; he could donate the immovables or all or a quota of the movables in which the community income was invested; he could alienate the community income as he saw fit for the purpose of injuring and defrauding his wife; he could refuse to have his administration terminated because of fraud, speculation, bad management or the confusion of his own affairs; he could refuse to pay over to the wife one-half

of the earnings accumulated by him since marriage where she obtained a separation of property or a divorce and particularly so where the divorce had been compelled by the wife's misconduct as where she had eloped with another man; he could will the entire community income away; he could object to the inheritance of one-half of the community property by his wife's illegitimate children born to her by another man.

But the husband in Louisiana can do none of these things.

How could it be said that an individual who has none of the powers above set out had "unfettered command" of the community income?

Who ever heard of a man who had "unfettered command" of income (to use the language of the *Corliss* case) or was "free to spend it substantially as he chose" (to use the language of the *Robbins* case) being unable to use it to pay his own debts or to improve his separate estate or to conceal it or fraudulently dispose of it as he saw fit or to give it away as he pleased or to refuse an accounting to an unfaithful wife or to her illegitimate children by another man? Who could say that a man has "unfettered command" of the income or is free to do as he pleases with it where he has only a power of management similar to that of a managing partner which his wife can terminate by demanding a separation of property which involves a dissolution of the community and an accounting of the community property in the hands of the husband whenever his affairs are in disorder or he proves an incompetent or faithless manager?

In *Lucas vs. Earl*, 281 U. S. 111 (1930), the salary and attorney's fees were earned by the husband and under the law of California were owned by him. He attempted by special contract with his wife to procure a different result. It was held that as the salary vested in him when it was earned, it was all taxable to him and this result would

not be prevented by a contract requiring him to share it with his wife *after* it had accrued. In the present case, the wife's interest in the community income vested from the moment of its accrual. From that moment, the husband's dealings with it were subject to the limitations already fully set forth. There was never a moment when the income vested in the husband free of those limitations. Moreover this result flowed from the Louisiana law and not from any special contract.

PART II.

A.

The Language and Terms of the Revenue Act of 1926, as Well as the Similar Language Contained in the Previous Acts, Standing Alone, Clearly Authorize the Filing of Separate Returns of Community Income by Husband and Wife, and Cannot, as a Matter of Independent Statutory Construction, be Interpreted as Taxing the Husband in Community Property States on the Half of the Community Income Which Belongs to and is Owned by the Wife.

(1) Husbands and Wives, as Individuals, are Authorized and Permitted by the Express Terms of the Revenue Act of 1926 to Make Separate Returns and Include in Such Returns the Income of Each Spouse.

Each of the statutes levying income taxes undertakes to tax the net *income of each individual citizen* of the United States.

The Revenue Act of 1926, under the heading of "Individuals" and under the heading of "Individual Returns", contains the following pertinent sections:

"Individuals.

Normal Tax.

"Sec. 210 (a) In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year *upon*

the net income of every individual (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, etc.

Surtax.

"Sec. 211 (a) In lieu of the tax imposed by Section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year *upon the net income of every individual* a surtax as follows: etc.

Individual Returns.

"Sec. 223 (a). *The following individuals shall each* make under oath a return stating specifically the items *of his gross income* and the deductions and credits allowed under this title—(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife; (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

"Sec. 223 (b) *If a husband and wife living together* have an aggregate net income for the taxable year of $3,500 or over, or an aggregate gross income, for such year of $5,000 or over—(1) *Each shall make such a return, or* (2) *The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.*

"Sec. 216 (c) A husband and wife living together, shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. *If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.*" (Italics throughout above quotations ours).

The above sections of the Revenue Act, it is to be noted, give to husbands and wives a right to elect to file separate returns or a single joint return, and plainly state that the *income of each* may be included in separate returns,

or consolidated in a single return. The language of the statute quoted above expressly and clearly authorizes the filing of separate returns by husband and wife to eliminate the calculation of their tax liability "on the aggregate income". This construction of the statute, clear upon its face, has been approved expressly or tacitly by every Attorney General who has considered the point. In Louisiana, Texas, Arizona and Washington community income has been divided between husband and wife in their Income Tax Returns on the basis of joint ownership, for many years, in accordance with the Rules and Regulations of the Internal Revenue Department specifically established by the Internal Revenue Bureau in accordance with an opinion rendered by the Attorney General of the United States. This was the procedure followed by the plaintiff and his wife in this case.

The language we have quoted from the Revenue Act of 1926 pertinent to this discussion is the same as the language of the preceding Revenue Acts dealing with this subject.

(2) The Community Partnership or Marital Community Does Not Come Within the Meaning and Classification of Trusts, as Described in the Revenue Act of 1926.

The marital partnership or community cannot by any stretch of the imagination be held to come within the meaning and description of *Trusts,* as defined and described in the Revenue Act of 1926. (Section 219a). The legal history of the community partnership and its attributes and relationships are *sui generis* and have never been described or defined by either the civil or common law jurisprudence and text book writers as *Trusts,* as known to and defined by the common law. It is not even contended in the government's brief that the community partnership is a *Trust* within the meaning of the Revenue Act of 1926. It is suggested inferentially, however, in the government's brief

that the husband as manager of the community partnership is analogous to a trustee and that trustees are required under certain circumstances to pay an income tax on the trust property under their control. The analogy suggested, upon analysis, is clearly fallacious but if it were well founded, the analogy would be in favor of the taxpayer in this case rather than the Government. It is to be particularly noted that a trustee is merely required to make a separate return for and pay the tax on the income of the trust estate which belongs to the beneficiary and which is under the control of the trustee. The income tax paid is paid out of the funds of the trust estate and not by the trustee personally. Furthermore, the trustee is not required to add to his *individual income* the *income of the trust estate under his administration for the purpose of calculating the surtax,* which is the principle the Government is contending should be applied to the husband in the case of community partnership income. The trustee makes one return as an individual, in which is included his personal income, and another separate return as trustee for the trust estate, in which is included the income from the property belonging to the beneficiary which is under his control. *The Government is contending, however, that the husband must include in his individual separate return the half of the community income which belongs to the wife and that the community income must be added to the husband's income for the purpose of computing his individual surtax.* We submit that it is clear that even if the husband, in his relation to the community income or his wife's interest therein, was intended to be described under the provisions of the Revenue Act dealing with *Trusts,* the only possible result would be that the husband would have to make one return for himself and a separate return as trustee of the community income, or his wife's interest therein. It has been pointed out in this brief that the property of married persons in Louisiana is

divided into three classes: the separate and individual property of the husband; the separate and individual property of the wife; and the community property belonging to both husband and wife jointly and in indivision. If the trust analogy is applied, therefore, the husband and wife would make three returns: one return including the husband's separate income, such as profits upon the sale of his separate property (see *Succession of McGee,* 132 La. 335) and perhaps his share of the community income; a second return for the wife including her separate income, if any; and a third return for the husband as managing partner or trustee of the community partnership income, or his wife's interest therein. Under the trustee analogy the husband could not possibly be required to include in his personal return income for which he was only trustee.

The reason why the so-called share of the community income of the wife was required to be included in the husband's personal return in the *Robbins* case was because the court decided, not that the husband was a trustee, but that all of the income was actually owned by and belonged to the husband, which was the real point at issue in the case.

For a further analysis of the Revenue Act under this subheading and a full discussion of the point, see the joint and supplemental brief filed in all the community income cases now being considered by the court.

(3) The "Community Partnership" Should be Classified Under the General Heading of "Partnerships" and the Revenue Acts Expressly Provide that Each Partner Shall Report in His Individual and Separate Income Tax Return His or Her Share of the Partnership Income Whether Distributed or not.

Section 218 (a) of the Revenue Act of 1926, under the heading "Partnerships", provides that:

> "Individuals carrying on business in partnership shall be liable for income tax only in their in-

dividual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, etc."

The Community or Marital Partnership, inherited from the Spanish and French Law, is certainly more closely analogous to Partnerships, as they are known to and defined by the common law, than to Trusts or any other common law status or legal relationship. The husband in Community Property States is the *Managing Partner* or *Master* of the *Community Partnership,* with liberal powers of administration so long as he is not guilty of mismanagement and acts in good faith and the partnership is not dissolved or liquidated for the various reasons provided by law. If the Marital Community or Partnership is to be considered as having been expressly included or referred to by analogy at all in the Revenue Act of 1926, it is submitted that logically and substantially it is described under the general heading of *Partnerships* quoted above.

If the Marital Partnership is analogized to partnerships as described in the Revenue Act of 1926, then we point out that the Revenue Act does not require the making of a return and the payment of an income tax by the managing partner based on the entire partnership income, but, on the contrary, provides that each partner shall report his share of the partnership income in his *individual return.* The husband and wife composing a community partnership, as the plaintiff and his wife in the instant case, would each report in *separate returns his or her half* of the community property income, in accordance with the express terms of the Revenue Act as hereinabove quoted. This is the exact procedure that was adopted by Mr. Pfaff, plaintiff in this case, and by his wife in the making of their income tax returns.

(4) There is Nothing in the Language of the Revenue Act of 1926, or Prior Acts, Expressly or Impliedly Indicating an Intent on the Part of Congress to Tax an Individual or Husband on Income Belonging to Another Person on the Theory of Administration and Control Over the Income Exercised by the Individual Citizen or Husband Sought to Be Taxed.

The government quotes and relies on the last paragraph of the *Robbins case* in support of its contention that the Revenue Act is to be construed as taxing an individual not only on his own property and income, but, in addition, on the income and property belonging to his wife over which he exercises certain attributes of control and management.

There is nothing in the language of the Revenue Act from which we have previously quoted, which either expressly or impliedly indicates an intention to tax individuals or husbands on income admittedly owned by another person, merely on the basis of the control and administration over the property and income exercised by the person or husband sought to be taxed. We have already shown under previous headings of this brief that the Act plainly indicates that it intends to tax *individuals* on the income belonging to the *individuals.* By the language of the Act it is the net income "of" an individual which is taxed, not net income "controlled by" an individual. The Act treats husbands and wives as individuals and states that husbands and wives are to be *separately taxed,* if they so elect, on the *income of each.* A *trust estate* is separately defined as an entity for purposes of taxation under the law and the trustee pays the tax for the trust estate and charges the tax to the trust estate. It is not even suggested or contended that a trustee because of his control and administration *should add to his personal income* the income from a trust estate for the purpose of calculating his individual income tax. Likewise, corporations are also taxed as separate entities. On the other hand, Partnerships, although specifically men-

tioned and classified in the Act, as we have previously stated, are not separately taxed as entities, but the income belonging to each partner is taxed to the *partner owning the income as an individual.*

To say that the Act contemplates the taxing of an individual on income that does not belong to him, because he has certain elements of control and dominion as an agent in the administration of the property, would by analogy justify the argument that the Act contemplates that a *managing partner* of an *ordinary partnership* must add to his separate individual income the income of the entire partnership, even though other partners are owners of a substantial part of the income, for the purpose of calculating his individual income tax, because as managing partner he possesses and exercises certain attributes of control and administration. It could also be argued with equal plausibility that in the case of a *trust,* especially a *spendthrift trust,* where the trustee has liberal powers of administration and control and the beneficiaries are correspondingly restricted, the trustee should *add* to his *individual separate income the income from the trust administered by him, for the purpose of calculating his income tax, because of the administration and control exercised by the trustee with respect to the spendthrift trust estate.*

The answer to all of these suggestions and analogies is that the plain language of the Revenue Act expressly provides to the contrary. A *Trustee* is authorized and required to make one return for his own individual income and another entirely separate return for the income of the *Trust Estate* under his administration and control; and each partner, under the provisions of the Revenue Act, makes an individual return of his share of the Partnership income, irrespective of any question of relative administration or control. The husband has no more complete control in a Marital Partnership than a managing partner of an ordinary partnership where the contract of

partnership vests liberal powers of control and administration in the managing partner. There is not a word or section in the present Revenue Act, or any previous Revenue Act, which even remotely implies that Congress intended not only to tax individuals on their *own* income, but also on the income of others, when the individuals in question were *agents or administrators possessing and exercising elements of control and dominion over the income of others.*

The assertion by counsel for the Government that the test is administration or control, instead of ownership, has no support whatever in the language of the Act. One can search in vain for any language or implication which even faintly suggests the compulsory grouping of the husband and wife as the *target* of a single tax, or which requires a tax levy to be made upon their joint incomes. The basic idea of an individual income tax is that persons owning individual incomes shall contribute to the support of the government on the basis of the income owned. The burden is imposed upon those who have prospered financially and the rate is fixed by the amount of the taxpayer's individual prosperity. The tax is imposed upon "gain", "profit", "income", but only upon the gain, profit and income of the individual taxed. The essential element is ownership, and ownership is fundamental in any conception of gain, profit or income.

(5) Statutes Are to Be Construed in Favor of Taxpayers.

It is a well settled and fundamental principle that statutes relating to taxes will not be construed so as to levy taxes by implication. The taxpayer is entitled to the benefit of all ambiguities and uncertainties in the matter of interpretation of statutes which would have the effect of levying additional taxes upon such taxpayer. This principle has become elementary. See *Gould vs. Gould,* 245 U. S. 151 (1917):

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth,* 2 Story 369, Fed. Cas. No. 16,690; *American Net & Twine Co., vs. Worthington,* 141 U. S. 468, 474, 35 L. Ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. United States,* 192 U. S. 38, 55, 48 L. Ed. 331, 338, 24 Sup. Ct. Rep. 189."

The Revenue Act of 1926 and previous acts are clear and unambiguous as we have pointed out. If, for the purpose of this argument, however, we assumed they were uncertain, the principle of law announced above would clearly apply under the circumstances of this case.

(6) The Question as to What is Property or Income and to Whom it Belongs is a Matter to be Determined by the Local State Law.

The present Revenue Act and all prior acts clearly evidence and indicate an intention to *tax an individual on the income which belongs to him and not the income of others, and the question as to what is property or income in any particular case for the purpose of applying the Federal Income Tax Law is and has always been considered a matter depending solely upon the local state statutes and decisions defining income and property rights.* It has always been recognized, as we have heretofore pointed out, that the Federal Revenue Acts, in taxing the income of *individuals,* do not purport to specify just how and under what circumstances income or property will vest in such individuals. The Federal Government generally recognizes that the laws of the respective States as to what is property and income, and in whom title to property or income is vested, are binding upon the Federal Government and will be followed by it, unless there is some *affirmative* and constitutional Federal Statute to the contrary.

This Court has repeatedly held that as a matter of settled policy it will follow the state decisions interpreting state laws governing property and property rights. See *De Vaughn v. Hutchinson,* 165 U. S. 566, at page 570; *Warburton v. White,* 176 U. S. 484, at page 496; *United States v. Crosby,* 7 Cranch, 115; *Middleton v. McGrew,* 23 Howard 45; *Lippincott v. Mitchell,* 94 U. S. 767; *Washington v. Miller,* 235 U. S. 422; *Buchser v. Buchser,* 231 U. S. 157; *Elmendorf v. Taylor,* 10 Wheat. 152, 159; *Hines Yellow Pine Trustees v. Martin,* 268 U. S. 458, 464; *Knights of Pythias v. Meyer,* 265 U. S. 30; *Bucher v. Cheshire R. Co.,* 125 U. S. 555; *Burgess v. Seligman,* 107 U. S. 20, 27.

This rule has been consistently applied, without a question as to its soundness, by the General Counsel of the Internal Revenue Bureau and in every opinion of an Attorney General discussing the Community laws, from the opinion of Attorney General Palmer in 1921 to the opinion of Acting Attorney General Mitchell in 1927, including the opinions of Attorney General Palmer (1921), Daugherty (1924), Stone (1924), Sargent (1926), Mitchell (1927). See *G. C. M.* 6351, *Int. Rev. Bull.* VIII-2, p. 188; 32 *Op. At. Gen.* 298, 435; 34 *ibid.* 376, 395; 35 *ibid.* 89, 265. The Treasury Department invariably applies this rule in the administration of the Federal Estate Tax Law. The court decisions, rulings of the Treasury Department and opinions of the Attorneys General referred to here, together with numerous other decisions and rulings, are discussed and quoted in the joint and supplemental brief filed in all the community income cases now being considered by the court.

Under the Louisiana Statutes and the decisions of the Supreme Court of Louisiana, as previously shown, the wife has a vested undivided one-half ownership in community property and community income.

But even if it were the law that the Federal Courts should define and determine the nature of the wife's interest in community property under the Louisiana Statutes,

for purposes of Federal taxation, independently and without reference to the authority of the Louisiana Supreme Court decisions, the Supreme Court of the United States has itself already in considering State Community Statutes and property rights similar to those of Louisiana in *Arnett v. Reade,* 220 U. S. 311, and *Warburton v. White,* 176 U. S. 484, held that the wife under such a system of law has a vested one-half interest in the community property and that the husband as managing partner or master of the community is merely the agent of the community for purposes of administration.

We submit, therefore, that whether the Federal Courts follow the decisions of the Louisiana Supreme Court interpreting the local statutes of the State or look to independent decisions of the Supreme Court of the United States for a proper definition and determination of the wife's right and interest in community property, the same conclusion has already been reached independently and separately by both the Supreme Court of Louisiana and the Supreme Court of the United States.

B.

The Uniform and Long Continued Executive Construction Recognizing the Right of Husband and Wife in all Community Property States, Except California, to Report Separately the Share of Community Income Owned by Each, Together With the Repeated Refusal of Congress to Amend the Law so as to Avoid Such Construction and the Re-enactment by Congress Without Change of the Provisions of the Revenue Act Which Had Received Such a Long Continued and Uniform Executive Construction, Constitute a Departmental and Legislative History Conclusively Demonstrating That There Was No Intention in the Revenue Act of 1926 to Tax Husbands on the Half of the Community Partnership Income Belonging to Their Wives.

Under the preceding headings of this brief we have discussed the plain and unambiguous meaning of the lan-

guage used in the Revenue Act of 1926 without reference to departmental decisions construing the language or to the legislative history in connection with the use of such language. We now propose to show that the opinions of the Attorney General and the Treasury Department in their rulings and decisions have repeatedly and consistently at all times up to this date interpreted similar language in the prior Revenue Acts as permitting husbands and wives to divide and report the community property partnership income in separate returns and, furthermore, as a matter of legislative history, that Congress has twice rejected, once in 1921 and again in 1924, attempts to write into the Act language designed to bring about the result for which the Government is now contending. Such departmental construction and legislative history clearly demonstrate the intent of Congress.

Executive Construction and Legislative History of Revenue Acts.

The Revenue Acts of 1918, 1921 and 1924 contain the same language as the pertinent language used in the Revenue Act of 1926 and the opinions of the Attorney General and the Treasury Department in their rulings and decisions have repeatedly and uniformly interpreted the similar language contained in the previous Acts of 1918, 1921 and 1924 as permitting husbands and wives in all Community Property States, except California, to make separate returns and as taxing husbands and wives for surtax purposes on the "income of each" as determined by state law. The Revenue Act of 1926 containing the same language as the previous acts was passed in the light of, and with actual knowledge of, this long continued executive construction.

The first exhaustive opinion on this subject was rendered by Attorney General Palmer on February 26, 1921 (32 Op. Atty.-Gen. 435), which was promulgated by the Commissioner of Internal Revenue as Treasury Decision 3138 on March 3, 1921. This opinion is a carefully prepared

document of about forty pages. (See supplemental joint brief filed in this case.) *In this opinion the Attorney General construes the Revenue Act of 1918 and previous Revenue Acts as taxing a husband and wife, for surtax purposes, on their income as separate individuals and held that under the Revenue Acts the question as to what was the income of the husband and what was to be considered as the income of the wife was a matter to be determined by an examination of the local Statutes and Supreme Court decisions in each of the Community Property States creating and defining property and property rights.* The Attorney General, accordingly, reviewed the Statutes and court decisions of the various Community Property States at length and reached the conclusion that the wife had an equal, vested ownership in half of the community property and income in the States of Washington, Texas, Louisiana, Arizona, New Mexico, Nevada and Idaho, and might, in these States, make a separate return of half of such community income for income tax purposes. In California, however, the Attorney General pointed out that the local Community Property Law was different in its attributes of ownership and legal nature from the other States and that the California Supreme Court had recognized such fundamental difference. The Attorney General, accordingly, held that under the law of California the wife did not have an equal ownership in the community property with the husband, but merely the right of an "expectant heir." See also Internal Revenue Office Decision No. 426 reported at 2 C. B. 198; Treasury Decision 3071 reported at 3 C. B. 221; opinion of Attorney General Mitchell rendered July 16, 1927, 35 Op. Atty.-Gen. 265, hereinafter referred to and quoted from.

This Court has repeatedly decided "that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution," and that, furthermore, "the

re-enactment by Congress without change of a statute, which had previously received a long continued executive construction, is an *adoption* by Congress of such construction." See *Brewster vs. Gage*, 280 U. S. 327; *United States vs. Cerecedo Hermanos y Compania*, 209 U. S. 337; *United States vs. G. Falk & Bro.*, 204 U. S. 143; *United States vs. Johnson*, 124 U. S. 236; *Copper Queen Mining Company vs. Arizona Board of Equalization*, 206 U. S. 474; *United States vs. Sweet*, 189 U. S. 471; *Komada & Company vs. United States*, 215 U. S. 392; *N. Y., N. H. & H. R. R. Co. vs. Interstate Commerce Commission*, 200 U. S. 361; *National Lead Company vs. United States*, 252 U. S. 140.

The Treasury Department rulings and decisions, the opinions of the Attorney General and the decisions of this Court referred to briefly under this heading, together with other additional authorities, are quoted and discussed at length in the joint and supplemental brief filed in all the community income cases now being submitted to the Court, and are not quoted from or discussed in detail at this juncture in order to avoid repetition.

Congress has Twice Rejected Amendments to the Revenue Act—Once in 1921 and Again in 1924—Which were Designed to Change the Law and Previous Executive Construction and to Expressly Permit the Taxing of the Husband having Administration of the Community Property Income on the Part of the Income Belonging to the Wife.

Revenue Act of 1921.

Accepting the construction placed upon the Act of 1918 by the opinion of the Attorney General and without obtaining an opinion as to the constitutionality of such attempted special legislation, the Treasury Department, in order to avoid and change the law as it existed and as it had been interpreted in Treasury Decision 3138 and the opinion of the Attorney General, recommended to Congress that the Revenue Law be changed; and the bill which later

became the Revenue Act of 1921, as sent to the Senate and as amended by the Finance Committee of the Senate, accordingly provided that:

> "Income received by any community shall be included in the gross income of the spouse having the *management* and *control* of the community property and shall be taxed as the income of such spouse." (Italics ours).

The amendment we have quoted was intended to overturn, in specific terms, the opinion of the Attorney General and the existing decisions and rulings of the Treasury Department and was a direct attempt by the Treasury Department to write into the Revenue Act of 1921 exactly what the Government is now contending the Revenue Act of 1926 means without the amendment. The amendment was vigorously opposed by numerous senators. In the discussion and arguments the opinion of the Attorney General was submitted to the Senate and printed in the Congressional Record. Briefs were filed and printed in the Record. The fundamental and practical features of the community property laws were pointed out in detail and the amendment was attacked by many senators on the floor as being unfair and as discriminating against the community property states. As a result of the opposition to the amendment proposed by the Treasury Department, an amendment introduced by Senator Broussard, striking out the objectional clause in the bill, was unanimously adopted. See Vol. 61, Congressional Record, pp. 7653, 8037-8.

The Treasury Department, having failed to persuade Congress to adopt the amendment we have discussed, which, if constitutional, would have overturned the existing rulings of the Attorney General and the decisions of the Treasury Department, continued to accept separate returns from husbands and wives in community property states, and the opinion of the Attorney General and the decisions and regulations of the Department, construing the Revenue Acts of 1921, 1918 and prior years, remained

in effect and operation without a question being raised as to their legal validity and soundness.

Revenue Act of 1924.

The Treasury Department in 1924 again attempted to have a provision, similar to the provision which had been rejected in 1921, inserted in the proposed new revenue act. At the public hearing held by the House Committee on Ways and Means, representatives of taxpayers of the various community property states involved appeared and in oral, as well as in written arguments filed with the Committee, explained the community property system, the opinion of the Attorney General and the Treasury decisions and made the same arguments that were made when the same amendment was proposed in 1921. It was urged that the adoption of such an amendment would be unfair and discriminatory. The lengthy arguments made, as well as the opinion of the Attorney General and Treasury Decision 3138, are printed in full in the report of Hearings before the Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 375, 478, 482. The Committee, with all this information as to the existing interpretation of similar language contained in previous acts, the rulings and practice of the Department, as well as a full discussion of the merits of the situation, rejected the amendment proposed by the Treasury Department, and the bill was finally passed with the amendment eliminated, thus clearly indicating that Congress approved and sanctioned the existing rulings and practice adopted by the Treasury Department and the opinion of the Attorney General permitting husbands and wives to make separate returns of community income in community property states, other than California.

Congress When it Passed the Revenue Act of 1926 Adopted the Executive and Practical Construction Placed

on the Similar Language Used in the Previous Acts of 1918, 1921 and 1924.

The Revenue Act of 1926 contains the same language as the Acts of 1918, 1921 and 1924, which had been uniformly and continuously construed by both the Attorney General and the Treasury Department. The regulations of the Department construing these Acts had been in effect and operation since 1920 and were in effect and operation when the Revenue Act of 1926 was passed. Two amendments attempting to amend the Revenue Acts of 1921 and 1924 and designed to overturn and change the meaning and effect of the Revenue Law as previously construed by the Attorney General and the Treasury Department, had been rejected. In short, the Act of 1926, containing language similar to that construed in the previous acts, was re-enacted in the light of, and with the actual knowledge of, the long executive and legislative history we have previously outlined in detail, and, under familiar and well-settled principles of law announced in the decisions of the Supreme Court heretofore cited, the same practical intent is to be presumed from the adoption of the 1926 Act as in the case of the 1924 and 1921 Acts.

That "Ownership" not "Control" is the Test of Income Taxation and that the Revenue Act of 1926 Intends to Tax Husband and Wife on the Income of Each as Determined by the Statutes and Decisions of Each State was Announced in the Last Opinion on this Subject Rendered by then Acting Attorney General William D. Mitchell, on July 16, 1927, After the Robbins Case, Dealing with the California Law, was Decided.

It is submitted that the Government's present contention in relation to the interpretation of the Revenue Act of 1926 is inconsistent with the opinion of Acting Attorney General Mitchell, rendered July 16, 1927, 35 Op. Atty.-Gen. 265, in which the meaning and effect of the Revenue Act of 1926 and the *Robbins* case were carefully considered and

these various test suits suggested. Mr. Mitchell, after discussing the *Robbins* case and the laws of the other community property states, suggested that test suits be arranged to determine whether the laws of the other community property states were sufficiently different from the laws of California to justify a change in policy on the part of the Treasury Department.

The portions of the opinion of Acting Attorney General Mitchell addressed to the Treasury Department, pertinent to the discussion under this heading of our brief, are as follows:

> "Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins*, 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918.
>
> "*The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income.* The Revenue Acts of the United States have been so drafted as to require the husband to *return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own unless the share belongs to her. The nature and extent of a wife's interest in community income in any of these States is to be determined from the statutes and decisions of the State.* * * *
>
> "The decision in the case of *United States vs. Robbins*, supra, dealing with the California system, does not necessarily dispose of the problem in the other States in which some forms of the community property system are in effect. In that case the ultimate inquiry was to the extent to which, under the statutes and decisions of California, the wife could exercise rights of ownership over a share of the community income. The same problem arises in each of the other States above mentioned. There are very

substantial differences between the so-called community property system in these various States. No two of them are just alike. Some resemble very closely the system in California dealt with in the *Robbins* case, but in other States the systems differ very considerably from the California system. * * *

"The answers to the questions involved are not so obvious as to make it clear what conclusions the courts may reach. To overturn by administrative actions and in reliance on an opinion of the Attorney General the method of dealing with community income which has prevailed in seven States, with the possibility that in the end, the courts would not agree with our views, would produce the utmost confusion and create an intolerable situation.

"On the other hand, so long as the former opinions referred to are allowed to stand, they interfere with your taking any steps to have these questions determined in the courts, and it must be admitted that the decision in *United States vs. Robbins* has raised very substantial doubts as to the soundness of the two opinions. * * *

"For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arrange for test cases in the courts or otherwise deal with the matter as you may think proper." (Italics ours)

Even if We Should Assume, for the Purposes of Argument, That the Language in the Last Paragraph of the Robbins Case Could be Taken as Construing the Revenue Act of 1918 to Tax the Louisiana Husband on the Income of His Wife (Which is Admittedly the Property of and Owned by the Wife Under State Law), if the Husband Had Control and Administration Thereof, This Court Would Not Have Announced Such a Rule of Construction of the Revenue Act if the Long and Uniform Executive and Legislative History of the Revenue Acts of 1918, 1921 and 1924 to the Contrary, Had Been Considered in Connection With the Construction of the Act.

We agree with Attorney General Mitchell, whose final opinion on this subject we have already quoted, that

the real point at issue in the *Robbins* case was whether or not the wife under the statutes and decisions of California had a real and substantial ownership in the community property, and that the enumeration of the husband's rights in the last paragraph of the decision was merely to show by analysis that the *husband* and not the *wife* was in law and substantial fact the owner of the community property under the law of California. We do not believe, as the Government now contends, that this Court intended a new rule of statutory construction in the last paragraph of the *Robbins* case, namely, that *control* and not *ownership* was the test to determine who should pay income taxes under the Act of 1926. Even if we assume, for the purpose of argument, that the language in the last paragraph of the decision is susceptible of the construction the Government is now attempting to place on it, we do not believe that the Court would have announced such a rule if the executive and legislative history of the community property controversy had been emphasized in the *Robbins* case, for that history negatives any congressional intent to adopt *control* rather than *ownership* as the basis of taxation.

The argument and briefs in the *Robbins* case were devoted to one issue, namely, the nature of the wife's interest in community property in California and in this connection the decisions and statutes of California were cited and the sole argument and question involved was as to the meaning and effect of these local decisions and statutes. The court did not consider the fact that the Attorneys General and the Treasury Department had continuously authorized and applied an interpretation of the Act of 1918 and the subsequent Acts of 1921 and 1924 contrary to the interpretation for which the Government is now arguing; nor that Congress had repeatedly reenacted the Revenue Act in the light of this long continued and uniform executive construction without change, there-

by adopting the construction of the Executive Department; nor did the Court refer to the legislative history of the controversy, which reveals that the Department twice attempted to amend the Revenue Act, once in 1921 and again in 1924, by inserting specific language which would have written into the Revenue Act what the Government now contends the *Robbins* case interprets the Act of 1918 to mean without such language, and that Congress rejected such amendments, both in 1921 and in 1924, showing clearly that it did not desire or intend the Act to have any such construction.

In short, none of this executive and legislative history, showing the purpose and intent of Congress, was considered by the Supreme Court when the *Robbins* case was decided. This Court would not have used the language in the last paragraph of the *Robbins* case, in the sense the Government now seeks to construe it, if the long executive construction of the Act of 1918 and its subsequent legislative history had been considered by the Court, in view of the unbroken line of Supreme Court cases we have heretofore cited dealing with the effect given by the courts to the executive construction of statutes and the re-enactment of statutes in the light of such executive construction. That Attorney General Mitchell shares our view on this point is, we believe, indicated by the language he employed in the opinion quoted *supra* in which he considered the question to be decided as entirely one of *ownership* by the wife.

D

Even if the Language of the Last Paragraph of the Robbins Decision can be Reasonably Construed as Holding That the Revenue Act is to be Interpreted as Showing an Intent on the Part of Congress to Tax California Husbands on the Entire Community Income Under the Circumstances Outlined in the Decision, it is not Applicable to Louisiana Because the Community Property Rights of Husbands and

Wives Under the Law of Louisiana are Radically and Substantially Different from the Community Property Rights of California Husbands and Wives, as Outlined in the Last Paragraph of the Robbins Case, as the Reason for its Conclusion and the Basis of its Decision.

We compare the California law, as stated by the Court in its opinion in the *Robbins* case with the Louisiana law with reference to each of the points suggested.

(1) The *Robbins* opinion states that in the most recent and controlling decision of the Supreme Court of California, that Court held "that the wife had a mere expectancy," and that it was the duty of this Court to follow this decision. In Louisiana, on the contrary, the Supreme Court of the State has held that the wife, under the Louisiana statutes, has an equal and vested half interest in community property. It is the duty of this Court to follow the Louisiana decisions.

(2) The *Robbins* opinion states that *Arnett vs. Reade,* 220 U. S. 311, holding that the wife had a vested interest and ownership in half of the community property in New Mexico, would not be followed in California. *Arnett vs. Reade,* not only would be followed in Louisiana, but has been followed. It was cited by the Supreme Court of Louisiana with approval in the case of *Phillips vs. Phillips, supra.*

(3) It is not true in Louisiana, as the *Robbins* opinion found it to be in California, that it is "a rule of property that has been settled" that the husband owns all of the community property and community income. The Louisiana Supreme Court, on the contrary, has established and announced as a settled rule of property that the wife owns half of the community property and community income.

(4) The opinion in the *Robbins* case in referring to the California husband says that "although restricted in the matter of gifts, etc., he may spend it substantial-

ly as he chooses, and if he wastes it in debauchery, the wife has no redress." This is not the law of Louisiana. Unlike the law of California, in Louisiana the husband, in addition to being restricted as to gifts, is expressly denied by statute the right to dispose of or deal with the community property in **fraud of his wife's** property rights in half of the community property. The broad equitable power of the Louisiana Courts in relation to fraud are an ever present potential protection to the wife against an unfaithful or dishonest husband, who deals with the community property in violation of his trust or fiduciary obligation as master and managing partner of the community. The husband is merely the managing partner of the marital partnership with full discretion and power of administration, but as an agent and *fiduciary* he must act in good faith in the handling of the wife's interest in the community partnership. If the husband wastes the community property in dissipation and debauchery for his own pleasure, it is clear that such conduct on his part is a disposition of the community property in fraud of the wife's rights prohibited by our statute.

Furthermore, the wife has in Louisiana under such circumstances, an additional legal remedy and safeguard which is also unknown to the law of California. In case the Louisiana husband, as the opinion in the *Robbins* case expresses it, "wastes the community property in debauchery," the wife in Louisiana would be protected against such waste and against any reckless and selfish spending of the community property, **even in the absence of fraud**, because she has the right, without seeking a separation or divorce, to demand a **separation of property**, in case the husband is a *reckless* or *careless* administrator or the *disorder of his affairs is such as to jeopardize the wife's community* or other property rights. The wife, in such cases, upon showing that her husband is wasteful, incapable, speculative or otherwise incompetent, or that his affairs

are in disorder, can obtain an immediate dissolution and liquidation of the community partnership, and can take over the separate control and administration of her half of the community and displace the husband as managing partner of the community partnership.

(5) In the opinion of the Court in the *Robbins* case, *Garrozi vs. Dastas,* 204 U. S. 64, a decision dealing with the right of the husband under the Porto Rican Community Property Law (which was similar to the California Community Property Law) was cited by this Court in support of the statement that in California the "husband may spend it (the community income) substantially as he chooses, and if he wastes it in debauchery, the wife has no redress." This statement is not true of the law of Louisiana, as heretofore shown, and *Garrozi vs. Dastas* would not be followed in Louisiana.

(6) The opinion in the *Robbins* case says, "not only should he who has all the power bear the burden. * * *" This statement describes the law of California, but not the law of Louisiana. In Louisiana the husband has not all the **power**. The husband's power of administration is substantially limited in Louisiana, since he cannot spend the income *recklessly* or in debauchery or deal with the property in fraud of his wife's rights, and even in the absence of fraud, in case of mismanagement and mal-administration, the wife can remove the husband as manager of the community partnership and take over herself the management of her half of the community property. None of these limitations on the power and rights of the husband exists in California. In addition to the limitations mentioned above, the husband in Louisiana is deprived of many other important powers and attributes of ownership hereinafter described.

(7) The wife in Louisiana has full power of **testamentary disposition** as to her one-half of the community

property and can will it to anyone she pleases, even a lover, because under the law of Louisiana she is the owner of half of the community property. In California, at the time the *Robbins* case was decided, the wife had no power to will any part of the community property because under the law of California it all belonged to and was owned by the husband. The entire community property in California belonged to the husband and was under his power and dominion as owner, and the wife could not deal with it or dispose of any part of it by will.

(8) The husband has not the right or power in Louisiana to have more than half of the community property **descend** to his heirs at law. In California, as in common law States where the husband is the absolute owner of all property acquired by him subsequent to marriage, when he dies intestate, his heirs at law, (including his wife as forced heir), inherit all the community property. In Louisiana, unlike California, since the wife owns half of the community property, when the husband dies, only half of that property **descends** to his heirs at law. The wife's one-half of the property acquired during marriage belongs to her and remains hers, and the heirs of the husband have no right or remedy or any claim of any kind with reference to the wife's one-half of the property.

It is clear that the husband cannot do with the wife's half of the community property as he pleases in Louisiana, since he cannot dispose of it by will and it is not inherited by his heirs. The right to will one's property and to have one's property descend to one's heirs are certainly two very important powers and attributes of ownership.

(9) If a separation from bed and board or divorce is obtained in California, as in any common law State in the Union, based on the wife's infidelity or unjustified desertion of the husband, the wife would not even be entitled to alimony, much less to a division of property. In Louisiana,

however, because the wife owns one-half of all property acquired during marriage and the community partnership is automatically dissolved and liquidated in case of separation from bed and board or divorce, she obtains full control and administration of her half of the community property and the husband is displaced as manager and master of the community, even though the wife is guilty and wholly to blame for the situation bringing about a dissolution of the community partnership. This right we are discussing is independent of any question of alimony, (which is governed by separate statutes), and grows out of the fact that, under the law of Louisiana, the wife is the real and substantial owner of one-half of the community partnership property and income. Thus, upon the termination of the partnership by either separation from bed and board or divorce, and irrespective of the merits of the marital disagreement, the wife in Louisiana is entitled to have the community partnership immediately dissolved and liquidated and to demand delivery to her of her half of the community assets and profits free and clear of the administration and control of the husband. Whatever may be said of the power of a California husband, it certainly cannot be said, under the circumstances we have outlined, that a husband in Louisiana has full power and control over the community property, "as if it were his own," when, without any fault on his part he may at any time lose such power of administration and control over the wife's half of the property.

(10) In California, since the husband is owner of all the community property, which includes property acquired by the husband during marriage, if the wife dies before the husband, her death has no effect whatever on the husband's right to property acquired during the marriage. He continues owner as before, and the property acquired during marriage forms no part of his wife's estate and continues to be his property. The same is true in all common law States. In Louisiana, on the contrary, if the wife dies

before the husband without having disposed of her part of the community property by will, the community partnership must be liquidated and one-half of the property must be delivered by the husband to the heirs of the wife. If the wife leaves a will, one-half of the property must be delivered by the husband to the legatees of the wife. If the wife dies without a will and there are no children, the husband is the heir of the wife in so far as her one-half of the community property is concerned, and he inherits this half of the community property as any other heir. Likewise, if the wife wills her half of the community property to the husband, the husband takes as a legatee. In all cases the heirs or legatees of the wife must pay a state inheritance tax and Federal Estate Tax. If it so happens that the husband is the heir or legatee of the wife, he must pay an inheritance tax under the law of Louisiana, as well as an estate tax under the Federal Estate Tax Law. The half of the community property belonging to the wife is, therefore, upon her death subject to both a State inheritance tax and a Federal Estate Tax. In California, during the period of time under discussion in the *Robbins* case, the husband owned all of the property acquired during marriage, although it was designated as community property, and, therefore, nothing could be inherited by him or willed to him by his wife and nothing could be inherited by or willed to any other person by the wife in the event of her death before her husband, and consequently, the husband was not compelled to pay either a State or Federal inheritance tax upon his wife's death.

(11) In California, if the husband dies before the wife, the wife is considered as taking her half interest by inheritance so that she must pay both State Inheritance taxes and Federal Estate taxes upon the half which she thus takes. In Louisiana, when the husband dies, the wife's half interest in the community property is not subject to any State Inheritance tax and the Government recognizes that

it is not subject to any Federal Estate tax because she takes not as **heir** but in **her own right.**

(12) If a husband has been continuously absent from his domicile for a period of five years, the wife in Louisiana is, at her option, entitled either to the administration of the community partnership property, or to a dissolution and liquidation of the community partnership. (See Article 64 R. C. C.) In California, since the husband is the owner of all of the community property the wife has no such right.

(13) Upon suing for a separation of property or a divorce the wife may obtain an injunction prohibiting the husband from disposing of the community property to her prejudice during the pendency of the suit. In California the wife is not entitled to a separation of property in case of mismanagement, much less to an injunction to protect her property rights, because in California, the husband owns all of the community property and the wife has no proprietary interest in it during marriage.

(14) If the husband in Louisiana uses the community income or community property to improve his separate estate, he must account to the community, and his separate estate becomes the debtor of the community. No such rule prevails in California since there all of the community property belongs to the husband and he can spend it on his separate property or in any way he pleases.

(15) If the husband in Louisiana wrongfully uses the community property income or property to pay his separate debts, he must account to the community, and his separate estate becomes the community's debtor. In California this is not the law. Since the husband owns all of the community property in California in the same way that he owns his separate estate he can do with the community property and income as he pleases.

(16) In the *Robbins* opinion it is said: "but the fund taxed, while liable to be taken for his debts is not

liable to be taken for the wife's, Civil Code, Section 167, so that the remedy for her failure to pay might be hard to find." In Louisiana the obligation to pay income taxes incurred by the husband and wife by the making of separate returns with the permission and consent of the husband as master and manager of the community, would be a community debt for which the community property could be levied on.

All of these substantial restrictions and limitations on the husband's administration of the one-half of the community partnership property belonging to the wife, resulting from the Louisiana marital partnership law, have been dealt with in detail under Part I of this brief. We have repeated them here briefly in connection with this phase of the argument in order to emphasize the radical and substantial differences between the law of California and the law of Louisiana, and to show that the reasons on which the last paragraph of the *Robbins* case was based do not apply under the law of Louisiana. We submit, therefore, that if the Court in its *Robbins* opinion, in enumerating the particular laws of California with respect to the rights of husbands and wives in community property in California, already referred to, is to be understood as justifying conclusions either with reference to the *power* or with reference to the *intent* of Congress to tax husbands on the entire community income, then, in either event, such reasons and conclusions do not apply in Louisiana because the Louisiana law differs widely from the law of California with respect to each of the statements of the law of California contained in the *Robbins* case.

CONCLUSION.

We submit:

That the wife in Louisiana is the vested owner of a one-half interest in the community income.

That the history of the Revenue Acts demonstrates that Congress intended to tax income in a community

partnership only to the owner thereof and not upon any theory of dominion or control.

That even if the history of the Revenue Acts were disregarded and it were held to be the intent of Congress to tax income to one who is not the owner thereof if he can spend it "substantially as he chooses" or if he has "unfettered command" of it, the husband in Louisiana cannot be taxed upon his wife's half of the community income because under the law of Louisiana he has not any such command over it nor can he spend it substantially as he chooses.

Respectfully submitted,

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APPENDIX

Louisiana Revised Civil Code, 1870:

Art. 64. The husband or wife of the absentee, who is not separated in estate from him or her, and who wishes to continue to enjoy the benefit of the community or partnership of matrimonial gains, which existed between them, may prevent the provisional possession or exercise of all the rights which may depend upon the death of the absentee, and claim and preserve for himself or herself in preference to any other person, the administration of the estate of his or her absent husband or wife.

If on the contrary the husband or wife of the absentee chooses rather to have the community dissolved, he or she may exercise and claim all his or her rights, both legal and conventional, on his or her giving security for such things as may be liable to be restored.

The wife who elects to have the community continued, has, notwithstanding, the right of renouncing it afterwards.

Art. 119. The husband and wife owe to each other mutually, fidelity, support and assistance.

Art. 120. The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

Art. 123. The woman separated from bed and board has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains.

Art. 136 The bond of matrimony is dissolved:

1. By the death of the husband or wife;
2. By a divorce legally obtained;
3. Whenever the marriage is declared null and void, for one of the causes mentioned in the fourth chapter of this title; or when another marriage is contracted, on account of absence, when authorized by law.

Separation from bed and board does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their

conjugal cohabitation, and to the common concerns, which existed between them.

Art. 138. Separation from bed and board may be claimed reciprocally for the following causes:

1. In case of adultery on the part of the other spouse.
2. When the other spouse has been condemned to an infamous punishment.
3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill treatment is of such a nature as to render their living together insupportable.
4. Of a public defamation on the part of one of the married persons toward the other.
5. Of the abandonment of the husband by his wife, or the wife by her husband.
6. Of an attempt of one of the married persons against the life of the other.
7. When the husband or wife has been charged with an infamous offense and shall actually have fled from justice, the wife or husband of such fugitive may claim a separation from bed and board on producing proofs to the judge before whom the action for separation is brought that such husband or wife has actually been guilty of such infamous offense, and has fled from justice.

Art. 149. During the suit for separation, the wife may, for the preservation of her rights, require an inventory and appraisement to be made for the movables which are in possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner.

Art. 150. From the day on which the action of separation shall be brought, it shall not be lawful for the husband to contract any debts on account of the community; nor to dispose of the immovables belonging to the same, and any alienation by him made after that time, shall be null, if it be proved that such alienation was made with the fraudulent view of injuring the rights of the wife.

Art. 155. Separation from bed and board carries with it separation of goods and effects.

Art. 159. The effects of a divorce shall not only be the same as are determined in the case of a separation from

bed and board, but it shall also dissolve forever the bonds of matrimony, between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them.

Art. 160. If the wife who has obtained the divorce, has not sufficient means for her maintenance, the court may allow her, in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income; provided, however, that in cases where the husband has obtained judgment of divorce on the ground that the married persons have been living separate and apart for a period of seven years or more, and the wife has not been at fault, then the court may allow the wife in its discretion, out of the property and earnings of her husband, alimony which shall not exceed one-third of his income.

This alimony shall be revocable in case it should become unnecessary, and in case the wife should contract a second marriage. (As amended by Act 21, Acts of Louisiana, 1928, p. 24.)

Art. 915. When either husband or wife shall die, leaving neither a father nor mother, nor descendants, and without having disposed by last will and testament, of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants, his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother, or either, then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother, or the survivor of them, and the other portion shall go to the surviving spouse. (As amended, Act 160, Acts of Louisiana 1920, pp.250-251.)

Art. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed by last will and testament, of his or her share in the community property, the survivor shall hold in usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

Art. 917. When the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, the law calls to his inheritance either the surviving husband or wife, or his or her natural children, or the State, in the manner and order hereafter directed.

Art. 2334. The property of married persons is divided into separate and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds or by inheritance, or by donation made to him or her particularly.

The earnings of the wife when living apart from her husband although not separated by judgment of court, her earnings when carrying on a business, trade, occupation or industry separate from her husband, actions for damages resulting from offenses and quasi offenses, and the property purchased with all funds thus derived, are her separate property.

Actions for damages resulting from offenses and quasi offenses suffered by the husband, living separate and apart from his wife by reason of fault on her part, sufficient for separation or divorce, shall be his separate property.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared. But when the title to community property stands in the name of the wife, it cannot be mortgaged or sold by the husband without her written authority or consent. (As amended, Act 186, Acts of La., 1920, pp. 304-305).

Art. 2392. Married persons may stipulate that there shall be no partnership between them.

Art. 2399. Every marriage contracted in this State, superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

Art. 2402. This partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estate which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both, because in that case the period of time

when the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws. (As amended by Act 68 of 1902, Acts of La., 1902, p. 95).

Art. 2403. In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects.

Art. 2404. The husband is the head and master of the partnership of community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyances *inter vivos,* by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage. A gratuitous title within the contemplation of this article embraces all titles wherein there is no direct, material advantage to the donor. (As amended by Act 96 of 1926, Acts of Louisiana, Reg. Sess., 1926, p. 136.)

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

Art. 2405. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess, are presumed common effects or gains, unless it be satisfactorily proved which of such effects they brought in marriage, or which have been given them separately, or which they have respectively inherited.

Art. 2406. The effects which compose the partnership or community of gains, are divided into two equal por-

tions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage, by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

Art. 2408. When the separate property of either the husband or the wife has been increased or improved during the marriage, the other spouse, or his or her heirs, shall be entitled to the reward of one-half of the value of the increase or ameliorations, if it be proved that the increase of ameliorations be the result of the common labor, expenses or industry; but there shall be no reward due, if it be proved that the increase is due only to the ordinary course of things, to the rise in the value of property, or to the chances of trade.

Art. 2425. The wife may, during the marriage, petition against the husband for a separation of property, whenever her dowry is in danger, owing to a mismanagement of her husband, or otherwise, or when the disorder of his affairs induces her to believe that his estate may not be sufficient to meet her rights and claims.

Art. 2430. The wife, who has obtained the separation of property, may, nevertheless, accept the partnership or community of gains, which has existed till that time, if it be her interest so to do, and upon her contributing, in case of acceptance, to pay the common debts.

She retakes, also, her dowry and all she brought in marriage, or which she acquired separately during the marriage by inheritance or otherwise.

Art. 2432. The judgment which pronounces the separation of property, is retroactive as far back as the day on which the petition for the same was filed.

Art. 2433. The personal creditors of the wife cannot, without her consent, petition for a separation of property between herself and her husband.

Nevertheless in case of the failure or discomfiture of the husband, they may exercise the rights of *their* debtor to the amount of their credits.

Art. 2839. Partnership *in commendam* is formed by a contract, by which one person or partnership agrees to furnish another person or partnership a certain amount, either in property or money, to be employed by the person or partnership to whom it is furnished, in his or their own name or firm, on condition of receiving a share in the profits, in the proportion determined by the contract, and of being liable to losses and expenses to the amount furnished and no more.

Art. 2844. The partner *in commendam* can not bind the other partner by any act of his: he is not considered as a partner, further than is specially provided in this section.

Art. 2849. The business of the partnership, to which the partner *in commendam* has contributed his advance, must not be carried on in the name of such partner, or in his name jointly with others, or by him or by his agency as agent, or attorney for the other partners, but by those to whom he has made the advance, and in their name or firm; and if the advance *in commendam* has been made to one person only, such person must carry on the business in his sole name, and must not make the addition "and company," or adopt any firm that may cause it to be understood that he has any partners.

And if the partner *in commendam* shall take any part in the business of the partnership, or permit his name to be used in the firm, or knowingly permit any single person to whom he has made the advance, to add any words to his name or firm, that may imply that he has other partners besides the partner *in commendam*, when in fact he has none, such partner *in commendam* shall be liable to all the responsibilities of a general partner in the business for which he has made the advance.

BENDER, COLLECTOR OF INTERNAL REVENUE, *v.* PFAFF.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86. Argued October 22, 23, 1930.—Decided November 24, 1930.

Under the law of the State of Louisiana the wife has a present vested interest in community property equal to that of her husband, and, under §§ 210 (a) and 211 (a) of the Revenue Act of 1926, the spouses are entitled to file separate income tax returns, each of one-half of the community income. Following *Poe* v. *Seaborn*, *q. v.*, *ante*, p. 101. P. 131.

38 F. (2d) 649, affirmed.

CERTIORARI, 281 U. S. 715, to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court, 38 F. (2d) 642, for the taxpayer in an action to recover from the Collector of Internal Revenue an amount paid under protest on account of income taxes for 1927. See statement in *Poe* v. *Seaborn, ante*, p. 101.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist*, *Mr. Sewall Key*, *Miss Helen R. Carloss*, Special Assistants to the Attorney General, *Mr. Paul D. Miller*, and *Messrs. Clarence M. Charest*, General Counsel, and *T. H. Lewis, Jr.*, Special Attorney,

Bureau of Internal Revenue, were on the brief, for Bender, Collector of Internal Revenue.

Under the laws and judicial decisions of the State of Louisiana, the husband's interest in the community income is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Citing numerous statutes and decisions, including: Louisiana Code of Practice, Arts. 105, 106, 107, 118; Louisiana Rev. Civ. Code, Arts. 121–132, 150, 155, 160, 2403, 2404, 2408, 2410, 2425, 2430, 2446; Act 132 of 1926; *Mitchell* v. *Dixie Ice Co.*, 157 La. 383; *Kelly* v. *Robertson*, 10 La. Ann. 303; *Demarets* v. *Demarets*, 144 La. 173; *McCaffrey* v. *Benson*, 40 La. Ann. 10; *Falconer* v. *Falconer*, 167 La. 595; *Le Rosen* v. *Oil Co.*, 169 La. 973; *Luthy* v. *Phillips Werlein Co.*, 163 La. 753; *Marshall* v. *Mullen*, 3 Robinson 328; *Succession of Curtis*, 10 La. Ann. 662; *Succession of McCloskey*, 144 La. 438; *Successions of M., S. & P. Cason*, 32 La. Ann. 790; *Beck* v. *Natalie Oil Co.*, 143 La. 153; *Hawley* v. *Crescent City Bank*, 26 La. Ann. 230; *National City Bank* v. *Barringer*, 143 La. 14; *Succession of James*, 147 La. 944; *Gosserand* v. *Monteleone*, 164 La. 398; *Fabacher* v. *Rouprich*, 160 La. 433; *Hellberg* v. *Hyland*, 168 La. 493.

While under certain circumstances the wife may bring the community to an end and secure a division of community property, she can not during the existence of the community substitute her management for that of the husband or demand any part of the community income for her own use. La. Rev. Civ. Code, Arts. 123, 150, 155, 160, 2408, 2410, 2425, 2430, 2446; La. Code of Practice, Art. 105; *Gastauer* v. *Gastauer*, 131 La. 1; *Viguerie* v. *Viguerie*, 133 La. 406; *Snoddy* v. *Brashear*, 13 La. Ann. 469.

Messrs. Charles E. Dunbar, Jr., and *Monte M. Lemann*, with whom *Messrs. J. Blanc Monroe* and *Walker B. Spencer* were on the brief, for Pfaff.

The wife, in Louisiana, is owner of one-half of community income and has a vested interest therein. La. Rev. Civ. Code, Arts. 915, 2334, 2399, 2402, 2404; *Phillips* v. *Phillips*, 160 La. 813; *Succession of Marsal*, 118 La. 212; *Succession of May*, 120 La. 692; *Beck* v. *Natalie Oil Co.*, 143 La. 154; *Liebman* v. *Fontenot*, 275 Fed. 688; *Warburton* v. *White*, 176 U. S. 484; *Arnett* v. *Reade*, 220 U. S. 311; *Dixon* v. *Dixon's Executors*, 4 La. 188; *Theall* v. *Theall*, 7 La. 226. See also, *Bek* v. *Miller*, 8 F. (2d) 797; *Rucker* v. *Blair*, 32 F. (2d) 222; *McLarry* v. *Commissioner*, 30 F. (2d) 789. Distinguishing *Guice* v. *Lawrence*, 2 La. Ann. 226.

The modern French commentators upon the Code Napoleon, upon which the Louisiana law is largely based, likewise recognize the wife's half ownership in community property. See Baudry-Lacantinerie, Vol. 13, § 247; Planiol et Ripert, Traite Pratique de Droit Civil Francais (1925), Vol. 8, §§ 156-8, 516.

The husband does not have unfettered command or control of community income under the Louisiana law. La. Rev. Civ. Code, Arts. 2399, 2404; *Childers* v. *Johnson*, 6 La. Ann. 634; *Melady* v. *Succession of Bonnegent*, 142 La. 534; *Bister* v. *Menge*, 21 La. Ann. 216; *Radovich* v. *Jenkins*, 123 La. 355; *Snowden* v. *Cruse*, 152 La. 144; *Succession of Moore*, 42 La. Ann. 332; *Smallwood* v. *Pratt*, 3 Rob. 132.

Whenever the husband proves a bad manager, the wife may obtain a dissolution of the community without seeking a divorce or personal separation, and may enjoin the husband from further management of community partnership property. La. Rev. Civ. Code, Arts. 2425 to 2437; *Davock* v. *Darcy*, 6 Rob. 342; *Jones* v. *Morgan*, 6

La. Ann. 630; *Wolfe & Clark* v. *Lowry*, 10 La. Ann. 272; *Mock* v. *Kennedy*, 11 La. Ann. 525; *Webb* v. *Bell*, 24 La. Ann. 75; *Vickers* v. *Block*, 31 La. Ann. 672; *Chaffe* v. *Watts*, 37 La. Ann. 324; *Brown* v. *Smyth*, 40 La. Ann. 325; *Walmsley* v. *Theus*, 107 La. 417; *Gastauer* v. *Gastauer*, 131 La. 1; *Jones* v. *Jones*, 119 La. 677; *Larose* v. *Naquin*, 150 La. 353, 358; *Hill* v. *Hill*, 115 La. 489; *White* v. *White*, 159 La. 1065; *Smallwood* v. *Pratt*, 3 Rob. 132.

Even if the husband is a good business manager, the wife may terminate his administration by suing for divorce or personal separation whenever he is guilty of misconduct and may then enjoin him from further management or disposition of community property. La. Rev. Civ. Code, Arts. 123, 149, 150, 159; *Dillon* v. *Dillon*, 35 La. Ann. 92; *Succession of Le Besque*, 137 La. 567; *Crochet* v. *Dugas*, 126 La. 285; *Williams* v. *Goss*, 43 La. Ann. 868; *McClelland* v. *Gasquet*, 122 La. 241.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The question presented in this case is the same as that dealt with in *Poe* v. *Seaborn*, *ante*, p. 101, *Goodell* v. *Koch*, *ante*, p. 118, and *Hopkins* v. *Bacon*, *ante*, p. 122. The only variant is that here we are concerned with the community property law of Louisiana. The case comes here on certiorari to the Fifth Circuit Court of Appeals, which affirmed (38 Fed. (2d) 649) a judgment of the District Court (38 Fed. (2d) 642) in favor of the respondent, whereby respondent recovered the amount of an additional assessment paid under protest. As in the other cases the Commissioner made this additional assessment on the theory that under the law of Louisiana the whole community income is to be treated as the income of the husband.

If the test be, as we have held it is, ownership of the community income, this case is probably the strongest of those presented to us, in favor of the wife's ownership of one-half of that income. The relevant statutes of Louisiana are noted in the margin.* So called "common property" includes all property acquired in any manner by husband and wife during marriage except donations made to one of the spouses, and except the wife's earnings and actions for damages when she is living apart from her husband, or carrying on a separate business or trade. The statutes speak of a marriage superinducing as a matter of right, "partnership or community" of acquêts or gains. Repeatedly the statutes refer to the relation as a "partnership or community." The decisions of the Supreme Court of Louisiana clearly recognize the wife's ownership of one-half of all the community income. They unequivocally declare that the wife's half interest in such community property "is not a mere expectancy during the marriage." (*Phillips* v. *Phillips*, 160 La. 813.)

As in the case of other states, whose law we have discussed in connection with this matter in the *Poe, Goodell* and *Hopkins* cases, *supra*, each spouse may by will dispose of only his or her one-half of the community and is powerless to affect the other's half. In case of death intestate one-half descends to the heirs of the decedent, and the other spouse is powerless to prevent this.

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* La. Revised Civil Code, 1870, Articles 57, 64, 120–121, 128, 131–132, 149–150, 155–156, 159–160 (as amended by Act 247 of 1916, p. 521); 915 (as amended by Act 160, 1920, p. 250); 917, 2332, 2334 (as amended by Act 186, 1920, p. 304); 2383, 2386, 2392–2401, 2402 (as amended by Act 68 of 1902, p. 95); 2403, 2404 (as amended by Act 96 Reg. Sess. 1926, p. 136); 2405–2409, 2410 (as amended by Act 4 of 1882, p. 5); 2411–2414, 2417–2419, 2421–2425, 2430; La. Code of Practice, 1870, Articles 105–107, 298; Act 102 of 1916, p. 223; Act 132 Reg. Sess. 1926, p. 207.

While the husband is the manager of the affairs of the marital partnership, the limitations upon the wrongful exercise of his power over community property are more stringent than in many states which have a community system. In Louisiana, if the husband proves, by reason of financial difficulties or the like, an unfit manager, the wife may bring about an immediate dissolution and liquidation of the community property. (*Wolf & Clark* v. *Lowry,* 10 La. Ann. 272; *Webb* v. *Bell,* 24 La. Ann. 75; *Brown & Learned* v. *Smythe,* 40 La. Ann. 325.) And when the wife sues for a separation of the property she is entitled to an accounting from the husband for community income or property in his hands and to reimbursement and retribution for any act done by him in fraud of her rights. (*Hill* v. *Hill,* 115 La. 489; *White* v. *White,* 159 La. 1065.)

In conclusion it may be noted that the Supreme Court of Louisiana has cited our own decisions in *Warburton* v. *White,* 176 U. S. 484, and *Arnett* v. *Reade,* 220 U. S. 311, indicating that the exposition of the wife's rights and of the nature of the community therein contained correctly states the Louisiana doctrine.

Inasmuch, therefore, as, in Louisiana, the wife has a present vested interest in community property equal to that of her husband, we hold that the spouses are entitled to file separate returns, each treating one-half of the community income as income of each " of " them as an " individual " as those words are used in §§ 210 (a) and 211 (a) of the Revenue Act of 1926.

The judgment of the Circuit Court of Appeals is

Affirmed.

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this case.